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J. A. Andrews

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Recommended Citation

J. A. Andrews, *The European Jurisprudence of Human Rights*, 43 Md. L. Rev. 463 (1984)

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THE EUROPEAN JURISPRUDENCE OF HUMAN RIGHTS

J.A. ANDREWS*

I. INTRODUCTION

Americans have long been familiar with a system of law in which certain individual rights are protected by a written constitution, and in which that constitution is paramount to any legislative or executive acts. In sharp contrast to the United States, however, the country whose legal system otherwise has had the greatest influence on American law lacks any equivalent written constitution. There are no fundamental rights in the United Kingdom beyond those established by decisions of the courts and Acts of Parliament. Even the Magna Carta can be and has been overridden by new legislation. Of course, human rights have been commonly recognised and protected within the United Kingdom, but this merely reflects the good sense of successive governments and generations of people. The fact remains that there has been no supra-legislative protection for the basic rights of United Kingdom citizens.

This situation now is changing, and the changes reflect the growing Europeanisation of the government and affairs of the United Kingdom. In the area of human rights we are not concerned with the European Economic Community, more frequently called the Common Market, but rather with an older and larger organisation known as the Council of Europe. This Article will review the origins and structure of the system for protection of human rights established by the Council of Europe, and then go on to examine the case law under that system and its impact on member states.

Throughout this discussion the primary but not exclusive emphasis will be on how the government and people of the United Kingdom have been affected by the protection of human rights under the auspices of the Council of Europe. This emphasis on the United Kingdom reflects the author's background and experience, but it is hoped that it also will serve to provide a kind of case study of some of the problems that can arise whenever individual rights and the conflicting needs of societies must be reconciled.

* Professor of Law in the University of Wales and Head of the Department of Law, University College of Wales, Aberystwyth.

II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Immediately following the Second World War there was a surge of interest among Europeans in the creation of a more unified Europe. The Movement for European Unity, as it has been called, was spearheaded by influential statesmen such as Sir Winston Churchill and supported by national and international organisations and political groups.¹ A number of those organisations joined together to organise a "Congress of Europe" at the Hague, in Brussels, in May of 1948.² The delegates to the Congress adopted a "Message to Europeans," which proclaimed in part that "[w]e desire a Charter of Human Rights guaranteeing liberty of thought, assembly and expression . . . ; [and w]e desire a Court of Justice with adequate sanctions for the implementation of this Charter"³ A proposal made during the Hague Congress further urged that "[g]overnments should as a condition of membership of the [proposed European] Council subscribe to a common Declaration guaranteeing the fundamental personal and civic rights essential for the maintenance of democracy and should recognise the authority of the Council to enforce them."⁴

A year after the Hague Congress ended the Council of Europe was born. The Council came into being on May 5, 1949, when the foreign ministers of its ten original member states signed the organisation's charter or Statute.⁵ According to its Statute, the Council was formed to pursue the aim of "greater unity between its Members" through, inter alia, "agreements and common action . . . in the maintenance and fur-

1. Churchill led the United Europe Movement in Britain. Other groups included the Economic League for European Co-operation, the French Council for United Europe, the European Union of Federalists, and the Socialist Movement for the United States of Europe. *MANUAL OF THE COUNCIL OF EUROPE* 3-4 (1970) [hereinafter cited as *MANUAL*]. On the Movement for European Unity, see generally A. ROBERTSON, *EUROPEAN INSTITUTIONS, CO-OPERATION: INTEGRATION: UNIFICATION* (3d ed. 1973).

The unifying accomplishment of the immediate postwar years included the creation of the Organisation for European Economic Co-operation in 1948 and the signing of the North Atlantic [Defence] Treaty in 1949. Two other accomplishments, the creation of the Council of Europe in 1949 and the signing of the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950, are discussed in the text. See *infra* notes 5-16 and accompanying text.

2. *MANUAL*, *supra* note 1, at 4.

3. *Id.*

4. *Id.* at 261.

5. *Id.* at 6-7. The Statute of the Council of Europe is reprinted in *id.* at 299 app. I [hereinafter cited as *Statute*]. The 10 original signatories to the Statute were Belgium, Denmark, France, the Irish Republic, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom (consisting of England, Wales, Scotland, and Northern Ireland). The Council now has 21 members, including Austria, Cyprus, the Federal Republic of Germany, Greece, Iceland, Liechtenstein, Malta, Portugal, Spain, Switzerland, and Turkey in addition to the original 10 members.

ther realisation of human rights and fundamental freedoms."⁶ The Council's Consultative Assembly made protection of human rights the subject of one of its early general debates, and appointed a committee to look into how member states might collectively guarantee such rights.⁷ Just over a year after that early debate, on November 4, 1950, the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention)⁸ was signed—the first convention concluded under the auspices of the Council of Europe.

The Convention recognises certain basic rights and freedoms as "the foundation of justice and peace in the world,"⁹ which the states party to it (the High Contracting Parties) "shall secure to everyone within their jurisdiction."¹⁰ It provides that everyone whose rights under the Convention have been violated "shall have an effective remedy before a national authority,"¹¹ and that the rights and freedoms it

6. Statute, *id.* art. 1(a)-(b).

7. MANUAL, *supra* note 1, at 261 (debate on Aug. 19, 1949).

8. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953), *reprinted in* R. LILLICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 500.1 app. (1983) [hereinafter cited as Eur. Conv. on Human Rights]. The Convention entered into force when it had been ratified by 10 member states. MANUAL, *supra* note 1, at 263. It has now been ratified by all 21 current member states. COUNCIL OF EUROPE, REPORT ON THE [A]CTIVITIES OF THE COUNCIL OF EUROPE 24 (1982).

A number of books have been written on the European Convention on Human Rights but, because of its rapidly developing case law, some of them are becoming increasingly dated. They include R. BEDDARD, HUMAN RIGHTS AND EUROPE (2d ed. 1980); F. CASTBERG, THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1974); A. DRZEMCZEWSKI, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW (1983); J. FAWCETT, THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1969); F. JACOBS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1975); Z. NEDJATI, HUMAN RIGHTS UNDER THE EUROPEAN CONVENTION (European Studies in Law Vol. 8, 1978). The Drzemczewski book itself contains a very good bibliography. On the history of the Convention, see A. ROBERTSON, HUMAN RIGHTS IN EUROPE 1-14 (2d ed. 1977).

9. Eur. Conv. on Human Rights, *supra* note 8, preamble.

10. *Id.* art. 1. The rights and freedoms secured by the Convention include: the right to life (art. 2) (*see infra* notes 214-29 and accompanying text); freedom from torture and inhuman or degrading treatment (art. 3); freedom from slavery and servitude (art. 4); "the right to liberty and security of person" (art. 5); certain procedural rights "in the determination of . . . civil rights and obligations or of any criminal charge" (art. 6); freedom from being prosecuted successfully under *ex post facto* criminal laws (art. 7); "the right to respect for . . . private and family life, . . . home and . . . correspondence" (art. 8); "freedom of thought, conscience and religion" (art. 9); "freedom of expression" (art. 10); "freedom of peaceful assembly" and association (art. 11); and "the right to marry and . . . found a family" (art. 12). Additional rights and freedoms are protected by several protocols to the Convention—e.g., rights to property, education, and free elections. Protocol No. 1, Mar. 20, 1952, 213 U.N.T.S. 262 (entered into force May 18, 1954), *reprinted in* R. LILLICH, *supra* note 8, at 510.1 app. (1983) [hereinafter cited as Protocol No. 1].

11. Eur. Conv. on Human Rights, *supra* note 8, art. 13.

guarantees "shall be secured without discrimination on any ground."¹² The obligations of the states party to the Convention may be derogated from "[i]n time of war or other public emergency threatening the life of the nation,"¹³ but the rights guaranteed by the Convention may be restricted only for prescribed purposes.¹⁴

One aspect of the Convention was entirely unique at the time of its drafting, and is responsible for the special character of the Convention as an international agreement protecting human rights: It does not stop at imposing obligations upon the states party to it, but goes on to provide a structure by means of which those obligations may be enforced. "To ensure the observance of the engagements undertaken by the High Contracting Parties" under the Convention, the European Commission of Human Rights and the European Court of Human Rights were created.¹⁵ Article 25 provides that each state signatory to the Convention, if it chooses, may recognize the competence of the Commission to receive petitions from "any person . . . or group of individuals claiming to be the victim of [that state's] violation" of rights guaranteed by the Convention. Article 46 further provides that the High Contracting Parties may "recognis[e] as compulsory . . . the jurisdiction of the Court in all matters concerning the interpretation and application of the . . . Convention."

The enforcement mechanism thus built into the Convention was an important innovation. Because of it the Convention has been characterised as *sui generis*, a law transcending traditional boundaries between international and domestic law and establishing "a new legal order."¹⁶ It ought to be noted, however, that the Convention was not entirely without precedent. In determining what substantive rights should be guaranteed, those responsible for proposing and drafting the Convention primarily looked to the Universal Declaration of Human Rights.

The Universal Declaration of Human Rights was signed on December 10, 1948.¹⁷ At the time of its proclamation it was said to have "a moral value and authority . . . without precedent in the history of the

12. *Id.* art. 14.

13. *Id.* art. 15. States signatory to the Convention also may limit the territories to which the protection of the Convention will extend (art. 63), may make a "reservation" at the time of signing or ratifying the Convention with respect to a particular provision or provisions that are inconsistent with domestic laws then in force (art. 64), and may withdraw prospectively from the Convention by means of a "denunciation" (art. 65).

14. *Id.* art. 18.

15. *Id.* art. 19; *see* arts. 20-56.

16. A. DRZEMCZEWSKI, *supra* note 8, at 22-23.

17. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948), *reprinted in* R. LILLICH, *supra* note 8, at 440.1 [hereinafter cited as Universal Declaration].

world,"¹⁸ and in fact it has been enormously influential.¹⁹ It was adopted by the General Assembly of the United Nations by a vote of forty-eight in favour and none against, with eight abstentions.²⁰ Among those who abstained was the delegate from the USSR.²¹ Behind his abstention lay an old problem: the difficulty of giving human rights a universally acceptable content. The Soviet Union objected to the Universal Declaration both because it included a defence of property rights and because it failed to include protection of the social and economic rights regarded as fundamental in Marxist ideology.

Unlike the members of the General Assembly in 1948, the founding members of the Council of Europe had a long common historical association and shared cultural, economic, and social values. The members were able to agree fairly quickly, therefore, as to which human rights were to be protected by the Convention (and by the first protocol to the Convention, which followed shortly).²² The issues that for a time divided those who negotiated the Convention's terms revolved instead around the question of how the rights were to be stated and protected. Chief among those issues were:

(1) whether the rights to be protected ought to be phrased broadly or defined in detail;

(2) whether individuals ought to have direct access to process under the Convention; and

(3) whether there ought to be some form of compulsory jurisdiction over member states accused of violating their obligations under the Convention.²³

All three of these issues will be addressed, because the development of the new European jurisprudence of human rights can be understood only in light of the compromises reached with respect to each of them. The question as to whether rights ought to be stated broadly or defined

18. A. ROBERTSON, *supra* note 8, at 6 n.10 (quoting "a speech [by] the Belgian delegate upon the adoption of the Declaration . . .").

19. The Universal Declaration was drafted by an international commission headed by Eleanor Roosevelt, who envisioned it as a kind of Magna Carta for the world. A. ROBERTSON, *HUMAN RIGHTS IN THE WORLD* 26-27 (2d ed. 1982). U Thant, former Secretary-General of the UN, is reported to have noted in 1968 that the Universal Declaration had served as inspiration for more than 40 constitutions and had been quoted or reproduced in legislation all over the world. *Id.* at 28. For the history and impact of the Universal Declaration, see *id.* at 26-28 and sources cited therein.

20. A. ROBERTSON, *supra* note 19, at 27.

21. The other abstaining states were the Byelorussian Soviet Socialist Republic, Czechoslovakia, Poland, the Ukrainian Soviet Socialist Republic, Yugoslavia, Saudi Arabia, and South Africa.

22. See MANUAL, *supra* note 1, at 261-63; see also *supra* notes 8 & 10.

23. See, e.g., MANUAL, *supra* note 1, at 262.

in detail is in some ways the most fundamental of the three, but it will be addressed last because it is best considered in the light of an understanding of how individual access to process and compulsory jurisdiction over signatory states actually operate within the framework of the Convention.

*A. The Right of Individual Petition and the
European Commission of Human Rights*

The most radical innovation incorporated into the Convention was that individuals were to be allowed to petition the European Commission of Human Rights. The Convention was the first international instrument purporting to guarantee individual rights which also provided a means of enforcing them. Individuals were to have direct access to machinery of protection outside their own states, although under the compromise embodied in article 25, they could make application only against those signatory states that accepted the right of individual petition by lodging a separate declaration to that effect.²⁴

International legal historians probably will look back on the institution of this right as one of the greatest and most radical legal developments of the twentieth century.²⁵ Even if the Convention is viewed as regional rather than international in a broader sense, the significance of the achievement is not diminished. The most startling aspect of the right of individual petition under article 25 is that by lodging declarations recognising the Commission's competence to receive such petitions, all but four signatory states have allowed their treatment of their own citizens to be subjected to review in an international forum as a matter of right.²⁶ Sweden was the first of the High Contracting Parties to make this gesture of faith in the "likemindedness" and "common heritage"

24. Article 25 of the Convention provides that:

1. The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

2. Such declarations may be made for a specific period.

Eur. Conv. on Human Rights, *supra* note 8, art. 25.

25. Professor Morrisson, for example, has characterised the system of enforcing human rights under the Convention as "one of the few truly new social institutions of the twentieth century." C. MORRISSON, JR., *THE DYNAMICS OF DEVELOPMENT IN THE EUROPEAN HUMAN RIGHTS CONVENTION SYSTEM* v (1981).

26. Only Cyprus, Greece, Malta, and Turkey have not lodged a declaration accepting the right of individual petition. See A. DRZEMCZEWSKI, *supra* note 8, at 61.

posited in the Convention's preamble.²⁷ She and the other signatory states that took that step pioneered a course for others to follow.²⁸

Of course, where there is a right of individual petition there must be some kind of structure and process for the review of applications received. The first level of review within the framework of the Convention is the European Commission of Human Rights. The Commission consists of a number of members equal to the number of signatory states, which is twenty-one at present.²⁹ Its members generally are experienced lawyers, elected by the Committee of Ministers of the Council of Europe from lists of candidates nominated by the High Contracting Parties.³⁰

The Commission receives both individual applications under article 25 and referrals of alleged violations by the High Contracting Parties themselves under article 24. Any applications submitted under article 25 which fail to meet certain criteria are declared to be "inadmissible" and are rejected by the Commission. The Commission may not deal with a petition if all domestic remedies have not been exhausted or if more than six months have elapsed since the final domestic decision was

27. Sweden deposited its declaration under article 25 on February 4, 1952. COUNCIL OF EUROPE, EUR. CONV. ON HUMAN RIGHTS: COLLECTED TEXTS 602 (1981) [hereinafter cited as COLLECTED TEXTS].

28. Some who have followed have taken the idea even further: the American Convention on Human Rights, for example, provides an automatic right of individual petition without need for any declaration by a Contracting Party: "Any person or group of persons, or any nongovernmental entity legally recognised in one or more member states of the organisation, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party." American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II. 23, doc. 21, rev. 2 (English 1975), art. 44, *reprinted in* R. LILLICH, *supra* note 8, at 190.1, 190.12 [hereinafter cited as Am. Conv. on Human Rights].

The American Convention was signed in 1969 and entered into force in July of 1978 on the deposit of the eleventh instrument of ratification. The states acceding to it are Barbados, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, and Venezuela; the failure of the United States to ratify this treaty has been a source of considerable concern. It has to be admitted that to date there is little evidence that the adoption of the American Convention has improved the protection of human rights in Central and Latin America. *See generally* A. ROBERTSON, *supra* note 19, at 132-45.

Many of the rights protected under the European Convention also appear in the International Covenant on Civil and Political Rights, which was adopted by the General Assembly of the United Nations in 1966 and came into force in 1976 with the deposit of the thirty-fifth instrument of ratification. International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 49, 52, U.N. Doc. A/6316 (1966), *reprinted in* R. LILLICH, *supra* note 8, at 170.1. By December of 1982, 72 states had ratified this instrument.

29. Eur. Conv. on Human Rights, *supra* note 8, art. 20; *see also supra* note 5.

30. Eur. Conv. on Human Rights, *supra* note 8, art. 21(1). Members of the Commission serve for terms of six years, and may be reelected. *Id.* art. 22(1).

taken.³¹ Petitions also may not be anonymous, nor may they deal with substantially the same matter as already was before the Commission or another international body.³² The Commission's decision that a given application is inadmissible is final and is not subject to appeal.³³

When the Commission decides that an individual petition is admissible, or when any High Contracting Party refers to it an alleged breach of the Convention by another High Contracting Party, the Commission proceeds to investigate the merits of the complaint. The primary purpose of the Commission is to facilitate a friendly settlement between the parties.³⁴ If it fails to bring about a friendly settlement, the Commission forwards a report on the facts and its opinion on the merits of the case to the Committee of Ministers of the Council of Europe.³⁵ Within a three month period immediately after the Commission transmits its report to the Committee of Ministers, a case may be referred to the European Court of Human Rights.³⁶ If it is not referred within that time, the Committee of Ministers must decide by a two-thirds majority whether the Convention was violated, and, if so, what actions must be taken within what period of time.³⁷ The Committee's decision is binding on the High Contracting Parties.³⁸

In 1983 the Commission opened 3150 provisional files on the basis of correspondence received, but only 499 applications ultimately were registered for that year.³⁹ Decisions as to admissibility were made re-

31. *Id.* art. 26.

32. *Id.* art. 27(1). Petitions found to be "incompatible" with the Convention, "manifestly ill-founded, or an abuse of the right of petition" also are inadmissible. *Id.* art. 27(2).

33. MANUAL, *supra* note 1, at 268.

34. Article 28 provides in part that

[i]n the event of the Commission accepting a petition referred to it:

(a) it shall . . . undertake together with the representatives of the parties an examination of the petition, and, if need be, an investigation . . . ; [and]

(b) it shall place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in this Convention.

Eur. Conv. on Human Rights, *supra* note 8, art. 28.

35. *Id.* art. 31(1)-(2).

The Committee of Ministers is composed of the ministers of foreign affairs of member states or their alternates. It is "the executive organ of the Council of Europe . . ." MANUAL, *supra* note 1, at 20. The Committee of Ministers has ultimate authority over all internal Council matters, subject to certain powers specifically granted to the Consultative Assembly. *See generally id.* at 20-23. The Commission also must transmit a copy of its report to the state or states concerned, for their information but not for publication. Eur. Conv. on Human Rights, *supra* note 8, art. 31(2).

36. Eur. Conv. on Human Rights, *supra* note 8, arts. 32(1), 48; *see infra* notes 43-50 and accompanying text.

37. Eur. Conv. on Human Rights, *supra* note 8, art. 32(1)-(2).

38. Eur. Conv. on Human Rights, *supra* note 8, art. 32(4).

39. *See* EUROPEAN COMM'N ON HUMAN RIGHTS, STATISTICS 1983, DH (84)1, at 11.

garding 436 applications, and only 29 were declared admissible.⁴⁰ There are a number of explanations for these figures. Many preliminary letters were not followed up by correspondents, and others did not disclose even a provisional case of violation of the Convention. Upon investigation, many applications were found not to involve a violation of the Convention. Other complainants did not comply with the exhaustion requirements.

Those figures and the reasons for them are typical. Between its receipt of the first petitions in 1955 and the end of 1983, the Commission had opened 25,308 provisional files.⁴¹ It had registered 10,709 applications and had taken admissibility decisions on 9984 of which only 326 were declared admissible.⁴²

B. The European Court of Human Rights—Its Jurisdiction and Judgments

One of the difficult issues that those who framed the European Convention on Human Rights had to address was whether there should be compulsory judicial review of claimed violations of the Convention. The High Contracting Parties agreed that each of them should have an opportunity to challenge another under the Convention, and that for such a purpose the Commission of Human Rights was a necessary forum. But there is a difference between a commission able to review the facts and perhaps steer the disputing parties towards a friendly settlement, on the one hand, and a court with compulsory jurisdiction and power to give binding judgment on the other. As with the right of individual petition, so too on the issue of the compulsory jurisdiction a compromise was reached. Under article 46 of the Convention, signatory

40. *Id.*

41. *Id.*

42. *Id.*

The rejected applications ran a gamut from those that may have had merit, but did not disclose a violation of rights protected by the Convention, to the odd and the perverse. They included a petition against Czechoslovakia, which is not a signatory to the Convention, and one brought by the wife of Rudolph Hess, complaining of his detention in West Berlin where the Convention has no application. See Application No. 262/57 v. Czech.; Application No. 6231/73, *Ilse Hess v. U.K.* They also included a complaint that a sentence of detention violated the applicant's right to leave the Federal Republic of Germany—an argument that, had it succeeded, would have led to a rapid drop in the prison population—and another complaint that denial of permission to leave prison to allow the applicant to secure a postage stamp collection was a violation of his right to peaceful enjoyment of property. Another applicant argued that laws protecting minors against sexual abuse interfered with his right to private life. See Applications Nos. 5935/72, 3962/69, and 3099/67, all against Germany; see also *infra* note 182 and accompanying text (referring to the European laws with respect to homosexual relationships involving minors). See generally Andrews, *Current Survey: Council of Europe*, 1 EUR. L. REV. 94, 94-96 (1975).

states may make a special declaration accepting the compulsory jurisdiction of the European Court of Human Rights (the Court), but they are not subject to its jurisdiction unless they do so.⁴³

The Court constitutes the second and final level of review under the Convention for those cases that are referred to it. It currently consists of twenty-one judges, each elected by a majority of the Consultative Assembly of the Council of Europe from among candidates nominated by each member state.⁴⁴ All candidates for the Court "must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence."⁴⁵ Judges on the Court are elected for nine-year terms and may be re-elected.⁴⁶ Matters brought before the Court are heard either by the full Court or by a chamber consisting of seven judges, including (as an *ex officio* member) the judge who is the national of the member state involved.⁴⁷

Cases may be referred to the Court only by the Commission or by one of the High Contracting Parties—individuals have no right to take their own cases to the Court.⁴⁸ The Court's jurisdiction extends to "all cases concerning the interpretation and application of the . . . Convention" that are referred to it properly,⁴⁹ and its judgments are final and not subject to appeal.⁵⁰

43. *Cf.* Am. Conv. on Human Rights, *supra* note 28, art. 62, which contains an almost identical provision. Whereas all the states party to the European Convention, except Malta and Turkey, have accepted the compulsory jurisdiction of the Court, only four American states had accepted the compulsory jurisdiction of the Inter-American Court of Human Rights by June of 1983: Costa Rica, Honduras, Peru, and Venezuela. It appears likely, therefore, that for many years to come the European Court will be the principal body responsible for developing an international jurisprudence of human rights.

44. Eur. Conv. on Human Rights, *supra* note 8, art. 38, provides that "[t]he European Court of Human Rights shall consist of a number of judges equal to that of the Members of the Council of Europe. No two judges may be nationals of the same State." Article 39(1) provides that "[t]he members of the Court shall be elected by the Consultative Assembly by a majority of the votes cast from a list of persons nominated by the Members of the Council of Europe; each Member shall nominate three candidates, of whom two at least shall be its nationals." *Id.* art. 39(1). The judge elected from the list of Liechtenstein is a Canadian, but all other current judges are nationals of member states.

45. *Id.* art. 39(3).

46. *Id.* art. 40(1).

47. *Id.* art. 43. Rule 21 of the Court provides that, if more than one member state is involved, every judge who is a national of a state party to the case sits as a member of the Chamber. The president or vice-president of the Court also sits as a member *ex officio*, and the remaining judges are chosen by lot. COLLECTED TEXTS, *supra* note 27, at 407-08.

48. Eur. Conv. on Human Rights, *supra* note 8, art. 44. Article 48 specifies which High Contracting Parties may bring a case before the Court, provided that all the countries involved either have recognised the compulsory jurisdiction of the Court or have consented to come before it: the "Party whose national is alleged to be a victim; . . . [the] Party which referred the case to the Commission; . . . [and the] Party against which the complaint has been lodged." *Id.* art. 48.

49. *Id.* art. 45.

50. *Id.* art. 52; MANUAL, *supra* note 1, at 279.

By the end of 1983 the Court had rendered judgment in some seventy cases. This is a fairly high number of judgments, considering that as of that time many of the 326 applications admitted by the Commission were still before that body. It is primarily in the Court's judgments that a European jurisprudence of human rights is being developed, and it is primarily to those judgments that our focus will turn shortly. First, however, we need to consider what individual rights are protected under the Convention, and how they are defined.

C. Prescription of the Rights Protected

We now return to the first point on which there were differences of opinion among those negotiating the Convention: that is, whether the protected rights should be merely enumerated or whether they should be defined in some detail. Again a kind of compromise was reached, although on the whole the rights are expressed in language that is broad and open-textured.

Students of the United States Constitution are familiar with the expression of rights in broad terms. Can rights be more boldly stated than in the first amendment? "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."⁵¹ The language of this amendment is very different from the English tradition of legislation. It is the language of declaration rather than of legislation. Its open texture requires a court construing it to go beyond the normal compass of statutory interpretation and to become involved in an act of legislative engineering. Active judicial involvement is inevitable because no society can afford to tolerate absolute freedom of speech or of the press. Every society needs to protect itself and its members against the abuse of these freedoms, and therefore lines must be drawn. Such broad language leaves that line-drawing function to the courts.

Those who drafted the Universal Declaration of Human Rights for the United Nations in 1948⁵² dealt with the problem of specificity by opting simply to list most of the rights protected, with relatively little in the way of definition. For example, article 6 of the Universal Declaration provides that "[e]veryone has the right to recognition everywhere as a person before the law," and article 9 that "[n]o one shall be subjected to arbitrary arrest, detention or exile." A few of the Universal Declara-

51. U.S. CONST. amend. I.

52. See *supra* notes 17-20 and accompanying text.

tion's articles do state their principles in more detail. This approach is illustrated by article 25(1), which provides that

[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.⁵³

The Universal Declaration gets around the problem of the seeming absoluteness of the rights protected by means of a general qualification in article 29. That article notes that every individual has certain duties as well as rights and freedoms, and provides that the exercise of the latter "shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirement of morality, public order and the general welfare in a democratic society."⁵⁴

The European Convention on Human Rights incorporates a number of different approaches to the problem of broad statement versus narrow definition of rights. Its drafters made various compromises and accommodations, resulting in a kind of hierarchy of human rights. At the top of the hierarchy is a small number of rights that are stated broadly, with no qualifications, and from which signatories may not derogate. Article 3 is one of the provisions containing such preeminent rights; it provides in unqualified boldness that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." Similarly, article 4(1) provides that "[n]o one shall be held in slavery or servitude." These and one or two other provisions are at the top of the Convention's hierarchy in terms of providing near absolute protection.⁵⁵ The bold declaration of these rights is a reaction to the worst excesses of

53. Universal Declaration, *supra* note 17, art. 25(1). See also, e.g., art. 11 on penal offences.

54. *Id.* art. 29(2).

55. Article 15(2) also forbids derogation from article 7, which provides that "[n]o one shall be held guilty of any criminal offence" for an act or omission that was not "a criminal offence under national or international law" at the time when it was committed, nor may anyone be assessed a heavier penalty than was applicable at that time. Derogation also is forbidden with respect to article 2's right to life, "except in respect of deaths resulting from lawful acts of war." Eur. Conv. on Human Rights, *supra* note 8, article 15(2). Article 2 also is specifically qualified, however:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this

the Second World War and, like the drafting of similar provisions in the Universal Declaration, was intended to prevent any repetition of the atrocities of which the world had just become fully aware.

The other rights and freedoms under the Convention are all qualified in some way. Certain provisions have specific qualifications, such as article 4(2): "No one shall be required to perform forced or compulsory labour." No such freedom could be absolute, and thus it is qualified in paragraph (3) which provides that the term "forced or compulsory labour" shall not include work required to be done during the course of lawful detention, compulsory military service or service required of conscientious objectors in lieu of military service, and service imposed in connection with an emergency or calamity threatening the community or as part of normal civic obligations. Similar detailed qualifications may be found in articles 2 (the right to life)⁵⁶ and 5(1) (the right to liberty and security of person).⁵⁷

Another group of qualified rights under the Convention have more broadly-phrased qualifications. Article 8 is typical:

Article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Eur. Conv. on Human Rights, *supra* note 8, art. 2.

56. *See supra* note 55.

57. Article 5 provides, *inter alia*:

1. Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- a. the lawful detention of a person after conviction by a competent court;
- b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- f. the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Eur. Conv. on Human Rights, *supra* note 8, art. 5.

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Such general qualifications clearly allow signatory states a great deal of discretion to limit the scope of the rights or freedoms involved by applying their own substantive laws and standards.

Unlike the earlier Universal Declaration, the Convention also contains a provision which allows derogation from its terms. Article 15(1) provides that the contracting states may derogate from most of their obligations under the Convention "[i]n time of war or other public emergency threatening the life of the nation . . . to the extent strictly required by the exigencies of the situation."⁵⁸ As noted above, however, no derogation is permitted with respect to articles 3 (freedom from torture and inhuman or degrading treatment or punishment), 4(1) (freedom from slavery or servitude), and 7 (proscription against retrospective creation of criminal offences).⁵⁹

Finally, there are certain provisions in the Convention that are subject to derogation and were drafted in great detail. Examples of detailed drafting are to be found in articles 6 (rights to fair process in the determination of civil rights and obligations or criminal charges)⁶⁰ and 5(2) ("Everyone who is arrested shall be informed promptly, in a lan-

58. This right of derogation has been exercised by the Republic of Ireland and the United Kingdom in connection with the security problems posed by the Irish Republican Army (IRA) and its offshoots, the Provisional IRA and the Irish National Liberation Army. *E.g.*, 1973 Y.B. EUR. CONV. ON HUMAN RIGHTS 24, 26; 1971 Y.B. EUR. CONV. ON HUMAN RIGHTS 32; 1955-57 Y.B. EUR. CONV. ON HUMAN RIGHTS 47, 50. *See also infra* notes 105-13 and accompanying text. Other member states also have had occasion to derogate from the obligations imposed on them by the Convention. *See, e.g.*, 1978 Y.B. EUR. CONV. ON HUMAN RIGHTS 20 (establishment of martial law in 13 districts in Turkey).

59. Eur. Conv. on Human Rights, *supra* note 8, art. 15(2); *see supra* note 55 and accompanying text.

60. The European Convention on Human Rights provides:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of

guage which he understands, of the reasons for his arrest and of any charge against him").

In general, the rights and freedoms likely to be politically or socially sensitive either were qualified or were phrased quite carefully by the Convention's drafters. Article 8, for example, deals with privacy. It is qualified broadly to allow High Contracting Parties a great deal of latitude in taking domestic concerns into account.⁶¹ The first protocol to the Convention, which protects property rights and the rights to education and free elections,⁶² reflects the alternative technique of very careful drafting employed to a similar end.

The Council's member states had intended from the beginning to provide protection for property, education, and election rights under the Convention but, because there was initial difficulty in agreeing on a final text, those rights were left to be added in the first protocol. The difficulty is understandable in view of the political and social significance of the rights involved. Education is an expensive social undertaking, and if the right to education were to be interpreted as a right enforceable against the state, it could result in substantial burdens on the public exchequer. Article 2 of Protocol No. 1 therefore is worded carefully: "No person shall be denied the right to education." It does not impose an obligation on the state to provide education; indeed, this is made clear in the very next sentence: "In the exercise of any functions *which it assumes* in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."⁶³

the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Id. art. 6.

61. See *supra* text following note 57; see also *infra* text accompanying notes 125-28.

62. Protocol No. 1, *supra* note 10.

63. *Id.* art. 2 (emphasis added).

Even more sensitive is the right to free elections. A phrase like "fair and free elections" was ruled out by the United Kingdom Government since that could require the institution of some form of proportional representation to ensure a fair balance of representation. Article 3 of Protocol No. 1 therefore states instead that "[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." It has been held repeatedly that, whilst this means that electors must be free from any form of duress or influence, and political parties must be free to mount campaigns and put up candidates, there is no guarantee that every vote will be equal.⁶⁴ The language of the first protocol thus reflects the view that a system of elections which requires fair and equitable weighting of votes is not always the one which either the state or its citizens may wish to have.⁶⁵

The significance of the Convention's hierarchy of rights comes into focus when one of those rights or freedoms must be given substance in a particular case. What constitutes "inhuman or degrading treatment or punishment" within article 3 for example? Is it confined to the excesses of Auschwitz and Birkenau? Is it to be measured by the standards of 1944? For that matter, what is meant by "the right to respect for . . . private and family life" within article 8(1)? Is it the right to be safe from state police hammering on the door in the middle of the night, or is it to be interpreted in light of the much more highly developed sense of privacy which prevails in the 1980's? The Convention itself does not address these questions, but it does provide a structure which, though not dispositive, may strongly influence the search for answers.

It is at least arguable that the substantive content of the rights or obligations involved may more properly be construed broadly and be found to change with the times in those articles in which the Convention provides for a balancing of competing interests than in those in which the Convention's terms are absolute and unqualified. The second paragraph of article 8, for example, provides that the rights to privacy and to family life may be interfered with in accordance with the law and as

64. *See, e.g.*, *The Liberal Party and Others v. U.K.*, 1981 Y.B. EUR. CONV. ON HUMAN RIGHTS 320 (Eur. Comm'n of Human Rights), appl. no. 8765/79, 4 E.H.R.R. 106 (1980).

65. It is worth remembering in this connection that the relative weight of any given vote cast for a member of the United States Senate varies greatly depending upon whether a given voter is registered in a state with relatively few voters, such as Alaska (259,000 registered voters in 1980) or a state with many voters, such as New York (7,870,000 registered voters in 1980). U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1982-83, at 491 (103d ed. 1982). This is so because every state is represented by the same number of Senators—two. U.S. CONST. art. I, § 3, cl. 1.

necessary to protect the rights of others or in the interests of public safety, health or morals, national security, or economic well-being.⁶⁶ Given this broad qualification, the rights guaranteed may be construed broadly and still allow judicial inquiry into the actions of signatory states without unduly restricting the governments' options in particular situations.

Where the right is not so broadly qualified, however, and especially where the obligation in question may not be derogated from, the substantive meaning given to its terms could define what amounts to an absolute right or obligation under the Convention. Article 3's guarantee against torture and inhuman or degrading treatment or punishment is an example of an unqualified provision which may not be derogated from. It is at least arguable that courts will feel or ought to feel constrained to keep their construction of that guarantee within rather narrow limits so as not to restrict unduly the governments bound by it.

Guarantees that are qualified to a limited extent, such as the right to life in article 2 or the right to liberty and security of person in article 5,⁶⁷ may fall somewhere between the two ends of the continuum suggested above in terms of the flexibility permitted in their interpretation.

As the latter part of this article will make clear, the Commission and the Court of Human Rights have not necessarily followed the course suggested by this structural analysis of the Convention's guarantees. It will be useful, nonetheless, to keep it in mind as a possible standard against which decisions may be measured. Before we turn to the jurisprudence developing under the Convention, however, the additional issue of direct domestic enforcement of the Convention by the states party to it must be addressed.

D. Enforcement of the Convention: The Incorporation Question

The rights created under the European Convention on Human Rights were intended to be real, but at the same time the primary obligation for enforcement was left to the signatory states within their own jurisdictions.⁶⁸ Some states have incorporated the Convention into

66. See *supra* text following note 57.

67. See *supra* note 57; *infra* text accompanying notes 125-28.

68. Under article 1, "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in . . . this Convention." Eur. Conv. on Human Rights, *supra* note 8, art. 1.

As noted by Andrew Drzemczewski in his study of the impact of the Convention on the domestic laws of the High Contracting Parties, there is a variety of methods by which the substantive provisions of international agreements can be incorporated into domestic law: treaties may be given the rank of constitutional law by means of legislative enactment (and also possibly through

domestic law. For example, once the Belgian Parliament authorised ratification of the Convention and the government ratified it, the Convention's provisions were incorporated into Belgian domestic law under the terms of the Belgian Constitution. As a result, the status of the Convention in Belgium is comparable to that of Belgian domestic legislation, and individuals can pursue their rights under it in Belgian courts. The fundamental nature of the rights and freedoms thus protected may be limited, since under Belgian law any rules adopted by virtue of the ratification of an international treaty may be overridden by subsequent legislation, on the principle *leges posteriores priores contrarias abrogant*.⁶⁹ Recently, however, there has been evidence that the Belgian courts may be prepared to recognise a primacy for treaty laws where they conflict with ordinary domestic law.⁷⁰

In Austria the Convention has secured a more privileged position. There it has the normative equivalency of constitutional law and its protections rank alongside the other guarantees of human rights contained in the Austrian Constitution of 1920 and other Basic Law.⁷¹

Within the United Kingdom, the Republic of Ireland, Iceland, and the Scandinavian countries, however, there has been no domestic adoption of the European Convention on Human Rights.⁷² The obligations of these states under the Convention remain essentially international treaty obligations. English courts are not bound by the provisions of the Convention, and the individual who feels that his rights have been vio-

judicial interpretation to this effect); they can acquire a rank equal to that of other legislation; certain of their provisions may be applied by courts which consider them to be 'directly applicable', or alternatively cited by them as persuasive authority. Likewise, the provisions of international agreements can serve as guidelines for the drafting of bills—to both the legislative and the administrative authorities—and they can also be assumed to form part and parcel of 'general principles of law' or the domestic '*ordre public*' (in certain instances through the medium of customary international law) thereby influencing and modifying not only the practice of domestic courts and tribunals, but also the action of executive and administrative authorities.

A. DRZEMCZEWSKI, *supra* note 8, at 60.

69. "Later laws abrogate prior laws that are contrary to them." BLACK'S LAW DICTIONARY 809 (5th ed. 1979).

70. Andrew Drzemczewski suggests that the Convention "appear[s] to possess a hierarchically superior status to ordinary legislation" in Cyprus, France, Greece, Luxembourg, the Netherlands, Portugal, Spain, and Turkey, as well as in Belgium. A. DRZEMCZEWSKI, *supra* note 8, at 189. He notes, however, that "the Belgian and Dutch courts have been particularly active" in giving the Convention "extra-constitutional significance," *id.*, and that several of these other countries have failed to accept either the right of individual petition or the compulsory jurisdiction of the Court, or both, *id.* at 189-90. See generally *id.* at 61-92, 142-45, 154-70.

71. See generally *id.* at 93-106, 189. The Convention also has some constitution-like qualities in Switzerland and Italy. See generally *id.* at 116-24, 145-54, 189.

72. See generally *id.* at 125-41, 170-75, 177-87.

lated in the United Kingdom must pursue his remedy before the European Commission. English courts do make a genuflection to the Convention, however, in that they are prepared to look at its content if there is doubt as to the scope and meaning of a provision of English law.⁷³ It has been said that in such a case the courts should interpret the internal rule in a way that is consistent with the United Kingdom's obligations under the Convention.⁷⁴

This situation has given rise to a long-running political debate in the United Kingdom as to whether Parliament should take the positive step of incorporating the Convention into domestic law.⁷⁵ The issue often is associated with arguments for a new constitutional settlement in the United Kingdom, and to understand these arguments one must have some knowledge of basic principles of British constitutional law.

The United Kingdom has no written constitution as such.⁷⁶ There

73. For other views and more in-depth consideration of how the courts of the United Kingdom have dealt with the Convention, see Duffy, *English Law and the European Convention on Human Rights*, 29 INT'L & COMP. L.Q. 585 (1980).

74. British judges do not speak with one voice in their application of the Convention to British law. Some judges have accepted the Convention and ruled in a manner completely consistent with the Convention, *see, e.g.*, *Gleaves v. Deakin*, [1979] 2 W.L.R. 665, 667-68, 2 All E.R. 497, 498-99 (H.L.(E.)); (Article 10.2 of the Convention "requires that freedom of expression shall be untrammelled by public authority except . . . for the protection of the public interest."); *Reg. v. Secretary of State for the Home Dep't, ex parte Bhajan Singh*, [1976] 1 Q.B. 198, 202-03, [1975] 3 W.L.R. 225, 228-29, 61 I.L.R. 260, 262-63 (Q.B. Div'l Ct.), *aff'd* [1976] 1 Q.B. 198, 206-08, [1975] 3 W.L.R. 230, 230-32, 61 I.L.R. 264, 265-66 (C.A.) (recognizing article 12 right to marry according to the laws of the particular country, subject to article 5 restrictions); *Birdi v. Secretary of State for Home Affairs*, 61 I.L.R. 250, 256-58 (Eng. C.A. 1975) (British courts should take the Convention into account in interpreting registration under a presumption that Parliament did not intend to legislate contrary to the U.K.'s treaty obligations; if a statute conflicts with the Convention, the Court might hold the statute invalid). Others have merely cited to the Convention favorably or by analogy without actually relying on it, *see, e.g.*, *Schering Chemicals, Ltd. v. Falkman, Ltd.*, [1982] 1 Q.B. 1, 18, [1981] 2 W.L.R. 848, 861 (C.A.); *Ahmad v. Inner London Educ. Auth. (ILEA)*, [1978] 1 All E.R. 574, 577, 583 (C.A.) (also discussed *infra* text accompanying notes 77-83); *Reg. v. Secretary of State for the Home Dep't, ex parte Hosenball*, [1977] 1 W.L.R. 766, 779, [1977] 3 All E.R. 452, 457 (C.A.), 1 W.L.R. 789; *Reg. v. Secretary of State for the Home Dep't, ex parte Begum & Phansopkar*, [1976] 1 Q.B. 606, 626-28, [1975] 3 All E.R. 497, 511-12, 61 I.L.R. 390, 402-04 (C.A. 1975); *Waddington v. Miah*, [1974] 1 W.L.R. 683, 690-91, [1974] 1 W.L.R. 692, 694, 57 I.L.R. 175, 177 (H.L.(E.)); while other judges contend that the Convention has no weight or authority under the British system, *see, e.g.*, *Attorney-General v. British Broadcasting Corp.*, [1981] 3 W.L.R. 109, 128 (C.A.), [1980] 3 W.L.R. 130, 137 (H.L.); *U.K.A.P.E. v. A.C.A.S.*, [1980] 2 W.L.R. 254, 266-67 (H.L.(E.)); *Malone v. Metropolitan Police Comm'r*, [1979] Ch. 344, 362-66, 378, [1979] 2 W.L.R. 700, 716-20, 731.

75. *See, e.g.*, J. JACONELLI, ENACTING A BILL OF RIGHTS (1980); Samuels, *The Argument for a Bill of Rights in the United Kingdom*, in HUMAN RIGHTS IN CRIMINAL PROCEDURE (J. Andrews ed. 1982).

76.

The British constitution is partly unwritten and wholly flexible. Its basic sources are legislative Acts of Parliament, such as the Act of Settlement, 1701, and

is no clear separation of powers and no system of internal checks and balances in its government. Parliament (consisting of the monarch as head of state, the House of Lords, and the House of Commons) is sovereign. British constitutional rights are derived from constitutional conventions, court decisions, and Acts of Parliament. The last of these may at any time overrule the former. For the government of the day, if ensured of a clear majority in the House of Commons, this can mean virtually unchecked authority. The fact that human rights commonly are recognised and protected within the United Kingdom is dependent upon the good sense of the people and of successive governments and not on written constitutional guarantees.

Proponents of a new constitutional settlement in the United Kingdom tend to fall into either of two groups. There are those who would like to see the United Kingdom adopt a written constitution with a formal system of checks and balances, as in the United States. Then there are others who, although they would prefer to have a system of government based on long-standing conventions rather than on a formal written constitution, nevertheless would like to establish and entrench basic fundamental rights and freedoms for the individual. Proponents of the idea of entrenchment of human rights and freedoms come from both sides of the political spectrum. Some see the entrenchment of rights as a way of curbing any radical socialist engineering which a future left wing government might seek to introduce, while others see it as a way of curbing the excesses of a right wing government whose present or future policies towards minority groups may be discriminatory and intolerant.

These are political issues, and this is not the place to debate them. No position will be taken here with respect to their merits. It is important for our present purposes, however, to note that there would be very real obstacles to incorporating the Convention into United Kingdom law.

Many English judges would have great difficulty in interpreting the Convention if it were to be incorporated into English law. The style of the Convention is quite unfamiliar to English lawyers and judges, who are used to precise draftsmanship and not to the open-textured language of the Convention. Some may argue that it is by no means a foregone conclusion that British lawyers would be unable to rise to the challenge of interpreting the Convention's broader terms, and note that the quali-

decisions made by courts of law. Matters for which there is no formal law, as, for instance, the resignation of office by a government, are determined by important conventions of the constitution, based on precedent, but always open to development or modification.

18 *ENCYCLOPEDIA BRITANNICA MACROPAEDIA* 885 (15th ed. 1974).

fying provisions noted earlier do provide some guidelines for interpretation. In this respect the decision of the Court of Appeal in *Ahmad v. Inner London Education Authority*⁷⁷ is interesting.

Ahmad involved an appeal from the Employment Appeal Tribunal by a teacher who had been denied time away from work on Fridays to attend prayers at his local mosque. He had been offered and refused the alternative of relinquishing his full-time appointment and taking a part-time post. His appeal, which was dismissed, was based in part on his rights under the 1944 United Kingdom Education Act. During argument, however, Lord Justice Scarman, drew attention to article 9 of the Convention which guarantees "the right to freedom of thought, conscience and religion"⁷⁸

Lord Denning, Master of the Rolls, who has had an honourable track record for seeking to give the Convention as much effect as possible in English law, took the position that the Court of Appeal was not bound by the Convention but should do its best to see that its decisions should conform to the Convention as far as possible in law. He added, however, that the words of article 9 are "vague terms that . . . can be used for all sorts of unreasonable claims and provoke all sorts of litigation. As so often happens with high-sounding principles, they have to be brought down to earth."⁷⁹ He then went on to suggest that, whilst the Court should uphold religious freedom to the full, the principle should be applied with caution in the circumstances of the particular case, noting that "I see nothing in the European Convention to give Mr. Ahmad any rights to manifest his religion on Friday afternoons in derogation of his contract of employment and certainly not on full pay."⁸⁰

Lord Justice Orr, concurring with Lord Denning, drew attention to the fact that rights under article 9 may be qualified to the extent "necessary in a democratic society for the protection of the rights and freedoms of others," and took the position that the right could not extend to protecting a teacher who sought to exempt himself from his responsibilities

77. [1978] 1 All E.R. 574 (C.A.).

78. The full text of article 9 provides as follows:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Eur. Conv. on Human Rights, *supra* note 8, art. 9.

79. [1978] 1 All E.R. at 577.

80. *Id.* at 578.

during his contract of employment.⁸¹

Lord Justice Scarman, who often has argued for a Bill of Rights in English law and has shown himself to be the judge most conscious of the United Kingdom's international responsibilities and its domestic limitations in the area of human rights, dissented from his fellow judges. He thought their construction of the 1944 Act was in conflict with the principles of a multi-racial society and with statutory protection of the individual from discrimination. He went on to state that "against the background of the European Convention, this is unacceptable, inconsistent with the policy of modern statute law and *almost certainly* a breach of our international obligations."⁸²

As it turned out, Lord Justice Scarman was wrong. No doubt prompted by what was said in court, Mr. Ahmad subsequently took his complaint to the European Commission of Human Rights.⁸³ The Commission declared his petition inadmissible in March of 1981, quoting the limitations in article 9(2) and stating that there had been no violation of Mr. Ahmad's right to freedom of religion under article 9(1).⁸⁴ It appears then that although there was a difference of opinion, two members of the *Ahmad* court would have interpreted and applied article 9 in line with the Commission's own interpretation and to the same result, had they been called upon to apply the Convention in that case. The judge who often is most in tune with the Convention got it wrong, however.

The real problem that would be faced by the English judges if the Convention were incorporated into English law is not the relatively simple problem of construction seen in the *Ahmad* case. It would involve instead the much greater difficulty of deciding to what extent the developing jurisprudence of the European Court of Human Rights should be incorporated into English law. Without that jurisprudence the process of incorporation would become increasingly less valuable in giving internal effect to the external responsibilities of the United Kingdom. Those responsibilities are not simply to the static words of a 1950 text, but rather to a dynamic and developing system of law which finds its expression principally in the decisions of the European Court of Human Rights. If the United Kingdom sought to incorporate the entirety of the jurisprudence under the Convention, it would have to give primacy to

81. *Id.* at 581 (quoting Eur. Conv. on Human Rights, *supra* note 8, art. 9(2)).

82. [1978] 1 All E.R. at 585 (emphasis added).

83. *See Ahmad v. U.K.*, Eur. Ct. of Human Rights, 4 E.H.R.R. 126, *sub nom.* X v. U.K., 22 Decisions & Reports 27 (Eur. Comm'n on Human Rights), appl. no. 8160/78 (1981).

84. 4 E.H.R.R. at 134-38. The Commission took into account the fact that Ahmad had applied for the job knowing the conditions of service, that he had not disclosed that he might require time off from school, and that time-tabling classes in order to accommodate him would occasion severe difficulties for the school authorities. *Id.* at 135-36, paras. 12-19.

the decisions of the European Court of Human Rights. That is not something that English lawyers and the United Kingdom Parliament are likely to entertain lightly. It also would mean giving binding authority to a series of decisions couched in principles both more vague and more general than those used by English lawyers, delivered by judges who are much more prepared to accept the notion that laws may have their own dynamic. These significant constitutional obstacles would have to be overcome before incorporation could succeed.

One argument often advanced for incorporating the European Convention on Human Rights into English law is that it would reduce the number of complaints that go from the United Kingdom to the Commission in Strasbourg each year. The argument is that incorporation would prevent the embarrassment of so many judgments being given against the United Kingdom Government by the Court since it would reduce the number of applications deposited with the Commission.

The United Kingdom has suffered a comparatively large number of adverse decisions in proceedings before the Court.⁸⁵ In this respect it is interesting to note that the United Kingdom also has had a large number of applications made against her. Of 590 applications registered by the Commission in 1982, 190 were deposited against the United Kingdom; a further 98 were registered against Germany, 93 against France, and 42 against Switzerland.⁸⁶

Of course the number of applications registered does not necessarily reflect the failure of the respondent state to respect human rights. It may reflect in part the extent to which influential, well-financed, and determined pressure groups within a particular society are prepared to use the Strasbourg machinery to support their arguments for reform of executive practises and legislative discriminations.⁸⁷ Moreover, the large number of applications registered against the United Kingdom in 1982 was not entirely typical. In 1980 the Commission registered 103

85. See, e.g., Jensen, *The Impact of the European Convention for the Protection of Human Rights on National Law*, 52 U. CIN. L. REV. 760, 769-70 (1983); Kidd, 'Twas Easier Said Than Done': Britain and the European Convention on Human Rights, 14 MELB. U.L. REV. 104, 105 (1983). The Jensen article provides a table of the number of cases heard and the negative judgments involved in proceedings of the Court and the Committee of Ministers during the period 1959-1982. According to the figures presented, the United Kingdom was involved in more cases (nine before the Court, 11 before the Committee) and received more adverse decisions (eight from the Court, six from the Committee) than any other signatory state during those years.

86. See EUROPEAN COMM'N OF HUMAN RIGHTS, STATISTICS 1982, DH (83)6 table 2.1.

For a statistical breakdown of the number of individual applications filed against signatory states during the period 1957-1981, and a discussion of some of the possible factors involved, see Jensen, *supra* note 85, at 767-69.

87. Cf. Kidd, *supra* note 85, at 107 (noting the large number of organisations and pressure

applications against the United Kingdom and 106 against the Federal Republic of Germany,⁸⁸ yet the Convention became internally applicable as the domestic law of the Federal Republic Germany on September 3, 1953.⁸⁹ Similarly, the Convention has direct application in Belgium,⁹⁰ and yet almost as many cases have been brought against her in the European Court of Human Rights as against the United Kingdom. Like the United Kingdom, moreover, Belgium's record in that court is poor.⁹¹

groups in Britain as one possible mitigating factor in the large number of applications brought against her).

The situation of the United Kingdom in this respect may be contrasted with that of the Republic of Ireland. Republican extremism apart, Ireland has until recently been something of a quiet backwater. Her relative isolation from the major social and cultural changes occurring in European society since the early 1960's is evidenced by, among other things, the fact that the Irish Constitution still contains much of the dogma associated with European clericalism. There are signs in some parts of Irish society, however, of an emerging dissatisfaction with legal restraints on the provision of contraception, abortion, and divorce. *See infra* notes 186-97 and accompanying text. It is interesting to note that whereas very few applications against Ireland had been filed with the Commission other than those of zealous Republicans eager to advance the cause of the I.R.A., the number of applications from other parties is growing: from four in 1980 to nine in 1981 and 23 in 1982. This may well signal the beginning of developments more in line with changes in the United Kingdom and elsewhere in Europe.

88. *See* EUROPE COMM'N ON HUMAN RIGHTS, STATISTICS 1982, DH (83)6 table 2.1.

89. *See* A. DRZEMCZEWSKI, *supra* note 8, at 109.

90. *See supra* note 70.

91. In quite a few of the cases brought against Belgium within the past 20 years the Court has found some violation of the Convention. *See, e.g.*, Albert Case, Eur. Ct. of Human Rights, ser. A, no. 58, 5 E.H.R.R. 533 (1983) (arts. 6(1), 11); Van Droogenbroeck Case, Eur. Ct. of Human Rights, ser. A, no. 50, 4 E.H.R.R. 443 (1982) (failure to provide review of lawfulness of detention held to violate art. 5(4)); Le Compte Case, 1981 Y.B. EUR. CONV. ON HUMAN RIGHTS 434 (Eur. Ct. of Human Rights), ser. A, no. 43, 4 E.H.R.R. 1 (procedural deficiencies in professional disciplinary proceedings held to violate art. 6(1)); Deweer Case, 1980 Y.B. EUR. CONV. ON HUMAN RIGHTS 464 (Eur. Ct. of Human Rights), ser. A, no. 35, 2 E.H.R.R. 439 (provisional closure of defendant's business coerced him to pay a fine in "friendly settlement" of the charges against him and therefore violated art. 6(1)); Marckx Case, 1979 Y.B. EUR. CONV. ON HUMAN RIGHTS 410 (Eur. Ct. of Human Rights), ser. A, no. 31, 2 E.H.R.R. 330 (Belgium's illegitimacy laws held to violate arts. 8, 14; art. 1 of Protocol No. 1); De Wilde Case (no. 1), 1971 Y.B. EUR. CONV. ON HUMAN RIGHTS 788 (Eur. Ct. of Human Rights), ser. A, no. 12, 1 E.H.R.R. 373 (detention by administrative order without judicial review held to violate art. 5(4)); Belgian Linguistics Cases (nos. 1-2), 1968 Y.B. EUR. CONV. ON HUMAN RIGHTS 832 (Eur. Ct. of Human Rights), ser. A, nos. 5-6, 1 E.H.R.R. 241, 252 (1967-68) (legislation precluding access to French-language schools on basis of parental residence held to violate art. 14, read in conjunction with art. 2 of Protocol No. 1); *see also* Jensen, *supra* note 85, at 770 table 2.

Of course, violations have not been found in some cases brought against Belgium. *See, e.g.*, National Union of Belgian Police Case, 1979 Y.B. EUR. CONV. ON HUMAN RIGHTS 294 (Eur. Ct. of Human Rights), ser. A, no. 19, 1 E.H.R.R. 578 (1975) (Belgian legislation providing for consultation only with designated trade unions "on proposals concerning the status and working conditions" of public sector employees held not to violate art. 11(1)); Delcourt Case, 1970 Y.B. EUR. CONV. ON HUMAN RIGHTS 1100 (Eur. Ct. of Human Rights), ser. A,

It is not difficult to see the reason why applications still come to Strasbourg from those states in whose courts the Convention can be pleaded. In Germany the Convention does not prevail over Basic Law. It has the same status as any other federal law and is subject to the general rule *leges posteriores priores contrarias abrogant*.⁹² Similarly, although there is a presumption in Belgium that Acts of Parliament are intended to be in conformity with the Constitution and with treaty obligations, including obligations under the Convention, until recently the Belgian courts have hesitated to interfere with the doctrine of the supremacy of Parliament by reviewing the legality or constitutionality of Acts of Parliament.⁹³

While the United Kingdom has a poor record, therefore, in terms of the number of applications registered against it and the number of findings made against it by the European Court of Human Rights, its vulnerability to the procedures under the Convention is neither unique nor clearly the result of non-incorporation per se.

The solution to the problem of incorporation ultimately may be prompted by practical considerations of the best use of limited resources. Under the current system an individual is not allowed to plead his rights under the Convention before an English court, but instead has to suffer judgment against him before he is permitted to go to Strasbourg to seek amends for any violation of his rights under the Convention. This process is expensive, complicated, and protracted. Incorporation may be the most efficient and effective approach to protection of human rights in the long run, even though experience has shown that incorporation may not result in a drastic reduction in the number of applications submitted and judgments given against an incorporating state.

III. JURISPRUDENCE UNDER THE CONVENTION

Having reviewed the origins and structure of the European Convention on Human Rights, and having considered different approaches to its enforcement, we shall turn now to an examination of how the Convention has been interpreted in particular instances. We shall see how the Court and the Commission have extended the substantive protection afforded by certain of its provisions, and how the meaning and impact of the Convention as a whole have evolved or developed over

no. 11, 1 E.H.R.R. 355 (legislation which permitted a member of the *Procureur General's* department to attend the private deliberations of the Court of Cassation held not to violate art. 6(1)).

92. See A. DRZEMCZEWSKI, *supra* note 8, at 106-15.

93. *Id.* at 63-70.

time. Some cases will be considered according to the subject matter involved, such as early decisions in the area of pre-trial detention and detention without trial and cases dealing with questions of access to judicial process. The concept of "margin of appreciation" will be explained and illustrated with reference to a number of cases that raised questions about the interface between the Convention and the substantive laws of signatory states. Finally, the effect of changing social norms and mores on the interpretation of the Convention will be examined in the context of selected decisions to date and possible future developments.

A. *Detention Before or Without Trial*

The earliest decisions of the European Court of Human Rights suggested that a majority of judges were reluctant to give wide application to the protections contained in the Convention. Some of its early decisions appear very conservative indeed to a student of English common law, especially a series of cases in which the court was prepared to tolerate substantial delays in the determination of criminal charges.

The applicant in *Wemhoff v. Federal Republic of Germany*⁹⁴ was charged and arrested in November of 1961 but was not convicted until April of 1965.⁹⁵ His subsequent appeal against the conviction was rejected in December of 1965.⁹⁶ In *Neumeister v. Austria*,⁹⁷ a preliminary investigation by the Austrian authorities began in 1959, the applicant first was interrogated in 1960, and first charged and taken into custody in 1961.⁹⁸ His trial began in 1964 and judgment still had not been given when the case first came before the European Court in 1968.⁹⁹ The Court was not prepared to hold that article 6(1), under which a person is entitled to have criminal charges against him determined "within a reasonable time," had been violated in either of these cases.¹⁰⁰

Admittedly, the charges in *Neumeister* were complicated, and the

94. 1968 Y.B. EUR. CONV. ON HUMAN RIGHTS 796 (Eur. Ct. of Human Rights), ser. A, no. 7, 1 E.H.R.R. 55.

95. 1 E.H.R.R. at 59, para. 4, 63, para. 12.

96. *Id.* at 64, para. 15.

97. *Neumeister v. Aus.* (no. 1), 1968 Y.B. EUR. CONV. ON HUMAN RIGHTS 812 (Eur. Ct. of Human Rights), ser. A, no. 8, 1 E.H.R.R. 91.

98. 1 E.H.R.R. at 95-96, paras. 4-7.

99. *Id.* at 108, para. 24, 130, para. 19.

100. Article 6(1) provides, inter alia, that "[i]n the determination of . . . any criminal charge against him, everyone is entitled to a . . . hearing within a reasonable time by [a] tribunal" Eur. Conv. on Human Rights, *supra* note 8, art. 6(1). The Court held in the first *Neumeister* case that the period in question begins when a person is charged, 1 E.H.R.R. at 130, para. 18, and in *Wemhoff* that it "lasts at least until acquittal or conviction, even if this decision is reached on appeal," 1 E.H.R.R. at 78, para. 18. The relevant period at the time

Court did hold unanimously that Neumeister's pre-trial detention of over two years was excessive in the circumstances and a breach of the applicant's right under article 5(3) to be tried within a reasonable time or to be released pending trial.¹⁰¹ But that holding went only to the length of pre-trial detention and not to delay in proceeding with the case. In a number of other applications of this sort, both the Commission and the Court have applied standards of procedural expedition that would horrify an English lawyer, although both bodies have shown a greater and, from the English perspective, a more proper concern about the length of pre-trial detention.¹⁰²

Among the more interesting features of these early cases were the dissenting opinions of Judge Zekia from Cyprus. In Judge Zekia's view, the Convention's drafters aimed to set common standards for the freedom and safety of persons throughout the territories of the member states of the Council of Europe. In *Wemhoff* he specifically noted the Convention's preamble, which states that the European countries are "likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law"¹⁰³ He also drew attention to the vast differences in practice between common law and continental systems of trial and suggested that, whilst the signatories of the Convention would not have had it in mind to assimilate either the inquisitorial or the accusatorial system of trial or to seek to change the procedures adopted in the courts of member states, they might fairly be inferred to have intended to set common standards of liberty and expedition which would not vary vastly from one country to another.¹⁰⁴

of the Court's decision in *Neumeister* was over seven years and lengthening, since no judgment had yet been entered in the Austrian prosecution of the applicant.

101. 1 E.H.R.R. at 133, para. 25.

Article 5(3) provides that

[e]veryone arrested or detained in accordance with . . . paragraph 1(c) of this Article [see *supra* note 57] shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial [i.e. by the requirement of posting bond].

Eur. Conv. on Human Rights, *supra* note 8, art. 5(3).

102. In addition to *Neumeister*, see *Ringeissen v. Aus.*, 1971 Y.B. EUR. CONV. ON HUMAN RIGHTS 838 (Eur. Ct. of Human Rights), ser. A, no. 13, 1 E.H.R.R. 455 (total detention of applicant for over two and a quarter years held to exceed a reasonable time in violation of article 5(3), since justifications offered for his continued detention by the Austrian government were found to be without a basis in fact); *Stogmuller v. Aus.*, 1969 Y.B. EUR. CONV. ON HUMAN RIGHTS 364 (Eur. Ct. of Human Rights), ser. A, no. 9, 1 E.H.R.R. 155 (total detention of two years and seven weeks held to have violated article 5(3), as there were found to have been no dangers present sufficient to warrant refusal of provisional release pending trial).

103. *Wemhoff*, 1 E.H.R.R. at 88-89, para. 19 (Zekia, J., dissenting).

104. *Id.* at 88-89, paras. 17-20. Opinions such as his *Wemhoff* dissent have led Professor

In another case the Court early showed itself to be loath to restrict the ability of a signatory state to deal with threats posed by terrorism. The applicant in *Lawless v. Republic of Ireland*,¹⁰⁵ a member of the IRA, had been detained without trial by order of the Irish Minister of Justice under the Offences Against the State Act. That Act made the IRA an unlawful organisation in Ireland and made belonging to it an offence. The Act also granted the police extensive powers to stop, search, interrogate, and arrest suspects, and provided that any minister of state, if satisfied that a person had been involved in unlawful activities, could order his detention without trial. This last-mentioned power was made dependent upon the government's publishing a proclamation to the effect that the special powers of detention were "necessary to secure the preservation of public peace and order."¹⁰⁶

During the years 1954-57 the IRA carried out a number of attacks on Northern Ireland's police barracks and border patrols and on certain targets in the Irish Republic as well. The Republic responded by issuing a proclamation under the Act in July of 1957. Lawless had been arrested twice prior to the July proclamation, including once when he and three others were found to be in possession of a small armoury. On that occasion Lawless was acquitted on charges of unlawful possession of firearms and of being a member of the IRA, despite the fact that he admitted membership of the IRA. He was arrested again some months later, convicted, and served a short sentence. Finally he was re-arrested and detained for some five months under the special powers, before being released.¹⁰⁷

His detention in the last-noted instance was a clear breach of his right to liberty under the Convention since its lawfulness was not speedily decided by a Court as required by article 5(3).¹⁰⁸ There also was an equally clear breach of his right under article 6(1) to have criminal

Morrisson to characterize Judge Zekia as "present[ing] the clearest case for [judicial] activism . . . on the Court." C. MORRISSON, JR., *THE DYNAMICS OF DEVELOPMENT IN THE EUROPEAN HUMAN RIGHTS CONVENTION SYSTEM* 15 (1981). It is interesting to note that since the *Neumeister* and *Wemhoff* decisions both the Austrian and German governments have introduced new rules to reduce the time spent in custody awaiting criminal trial and have attempted to speed up their procedures for bringing accused persons to trial. See COUNCIL OF EUROPE, *STOCK-TAKING ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 45 (1982); Jensen, *supra* note 85, at 782-84. On the German reforms, see Madlener, *The Protection of Human Rights in the Criminal Procedure of the Federal Republic of Germany*, in *HUMAN RIGHTS IN CRIMINAL PROCEDURE* (J. Andrews, ed. 1982).

105. 1961 Y.B. EUR. CONV. ON HUMAN RIGHTS 430 (Eur. Ct. of Human Rights), ser. A, nos. 1-3, 1 E.H.R.R. 1, 13, 15 (1960-61). *Lawless* was the first case in which the European Court of Human Rights rendered an opinion.

106. 1 E.H.R.R. at 17, para. 3.

107. *Id.* at 18-19, para. 4.

108. See *supra* note 101.

charges against him determined within a reasonable time. The Irish Government argued, however, that since his intention was to destroy the rights of others he could not plead these articles in his own favour.¹⁰⁹ The Court rejected this argument on the ground that his right to have the lawfulness of his detention determined was not in conflict with the rights of others, even though his actions may have been.

If the Irish Government's derogation from its obligations under article 15 of the Convention had not been valid, therefore, the government would have breached those obligations in the *Lawless* case.¹¹⁰ Addressing the validity of the Irish derogation, the Court reasoned that the phrase "public emergency threatening the life of the nation" in article 15(1) clearly referred to "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed."¹¹¹ In the judges' unanimous view the Irish Government had reasonably deduced that there was such a threat to the life of the nation, arising in part from the existence of "a secret army engaged in unconstitutional activities and using violence to attain its purposes."¹¹² The Court also noted that there had been an "alarming increase in terrorist activities" between 1956 and 1957, and that insofar as the IRA was operating outside the Republic its activities had seriously jeopardised the Republic's relationship with the United Kingdom.¹¹³ The Court then inquired into whether the measures taken were limited to what was strictly required by the exigencies of the situation and, after reviewing the facts, concluded that the Irish Government had reacted reasonably.

109. The Irish Government was relying on Eur. Conv. on Human Rights, *supra* note 8, art. 17, which states:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

1 E.H.R.R. at 20-21, paras. 3-5.

110. Article 15(1) provides that

[i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

Eur. Conv. on Human Rights, *supra* note 8, art. 15(1). Under article 15(3) the High Contracting Parties which avail themselves of the right to derogate must keep the Secretary-General of the Council of Europe "fully informed" of the measures taken and the reasons therefor, and also inform him when such measures are no longer in effect. *Id.* art. 15(3).

111. 1 E.H.R.R. at 31, para. 28.

112. *Id.*

113. *Id.* at 32, para. 30.

Whether the IRA really represented a threat to the stability of the Irish Republic is doubtful. It clearly was an embarrassment, however, all the more so because of the unpredictability of Irish juries when trying cases involving IRA members.¹¹⁴ Had the European Court of Human Rights adopted a rigorous interpretation of the Convention so as to maximise the protection of human rights, it might have found for Lawless at the price of embarrassing the Irish government. The Court instead adopted more moderate standards, thereby preserving greater authority and flexibility for the domestic government.

B. Access to Justice

Compared to the Court's relatively conservative stance on the issue of the speed of trial in cases like *Wemhoff* and *Neumeister*, it has taken a much more active approach in promoting the principle of access to justice. The United Kingdom is among the signatory states that have suffered adverse decisions in this area. In her case, lack of judicial control over the exercise of executive power by the United Kingdom Home Office, coupled with a kind of administrative obtuseness which characterises certain actions taken by that department, have resulted in a series of applications under the Convention.

*Golder v. United Kingdom*¹¹⁵ was the first application from the United Kingdom to reach the Court. The applicant was a convicted man who had been identified as having been involved in a serious disturbance in the prison in which he was serving his sentence. The prison governor and the Home Secretary, exercising their powers under the Prison Rules,¹¹⁶ prevented him from writing to his Member of Parliament and from consulting a solicitor with a view to initiating civil libel proceedings. The Court's opinion in *Golder* showed that it was prepared to give a very positive interpretation to the following phrase in article 6(1): "In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The Court held that this language imported not only requirements of fairness, openness, and speed of judicial process, but also a fundamental right of access to that process. The majority opinion noted that, while article 6(1) "does

114. In addition to the problem of political sympathisers, Irish juries sometimes are influenced by fear of IRA reprisals.

115. 1975 Y.B. EUR. CONV. ON HUMAN RIGHTS 290 (Eur. Ct. of Human Rights), ser. A, no. 18, 1 E.H.R.R. 525.

116. The Prison Rules, "which were laid before Parliament and have the status of a statutory instrument," were drafted by the Home Secretary pursuant to statutory authorisation. *Golder*, 1 E.H.R.R. at 527-28, para. 17.

not state a right of access to the courts or tribunals in express terms,"¹¹⁷ the language of that article must be interpreted in light of the "rule of law" mentioned in both the Convention's preamble and the Statute of the Council of Europe.¹¹⁸

In the *Golder* Court's view it is a fundamental principle of law that "a civil claim must be capable of being submitted to a judge,"¹¹⁹ indeed, "in civil matters, one can scarcely conceive of the rule of law without there being a possibility of having access to the courts."¹²⁰ Were article 6(1) to be construed otherwise than so as to give a right of access to a court or tribunal, the Court reasoned, signatory states could abolish their courts or remove the protection of judicial impartiality from certain sorts of civil actions, resulting in a state of affairs "repugnant" to fundamental principles of law.¹²¹ It followed from that reasoning that, insofar as the Home Secretary impeded *Golder* from bringing legal proceedings by preventing him from contacting his solicitor, the Secretary had violated *Golder*'s rights under the Convention.¹²²

Judge Fitzmaurice of the United Kingdom argued in his dissenting opinion that it was wrong to seek to develop the Convention by interpretation, especially since that instrument was the outcome of a process of international agreement and compromise rather than an act of legislative sovereignty. The former sort of agreement, in his view, requires "an interpretation that [has] . . . a positive foundation in the convention that alone represents what the parties have agreed to—a positive foundation either in the actual terms of the convention or in inferences necessarily to be drawn from [them] . . ."¹²³ His reasoning was rejected by the majority of judges on the Court, who instead took the view that it was essential to construe article 6(1) so as to fill a gap that those

117. *Id.* at 532, para. 28.

118. *Id.* at 534-36, paras. 34-35.

119. *Id.* at 535, para. 35.

120. *Id.*, para. 34.

121. *Id.* at 536, para. 35.

122. This presupposes that, as the Court in fact held, a hindrance to the exercise of a protected right may constitute a violation of the Convention just as a legal impediment to the exercise of such a right would do. *Id.* at 531, para. 26.

123. *Id.* at 562-63, para. 32 (Fitzmaurice, J., dissenting).

Sir Gerald Fitzmaurice, a frequent dissenter while he was on the Court, showed himself to be very conservative in his attitude toward the development of the Convention. His opinions indicate that this was not the result of a desire on his part to limit the Convention's effectiveness as a source of protection of human rights, but rather a consequence of his traditional English approach to the construction of international instruments coupled with his experience as an international lawyer in the service of the United Kingdom Foreign Office. *See, e.g., id.* at 562-67, paras. 32-39. Judge Fitzmaurice also challenged the logical premises of the majority opinion in *Golder*. *Id.* at 563-65, paras. 33-37.

who negotiated the Convention could not conceivably have intended.¹²⁴

More recently, related decisions of the Court have put a good deal of pressure on the United Kingdom to establish full and proper rights for mentally disordered detainees to obtain judicial review of the lawfulness of their continued detention. This line of the Court's jurisprudence began to be developed in the case of *Winterwerp v. Netherlands*.¹²⁵ Article 5 of the Convention provides that everyone has the right to liberty and shall not be deprived of this right save in certain defined cases, such as the lawful detention of persons of unsound mind. In all cases where a person is arrested or otherwise detained, however, article 5(4) imposes an overriding obligation on the state: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." The Court noted in the *Winterwerp* case that, except in emergency cases, three minimum conditions must be satisfied for the lawful detention of a person of unsound mind: (1) it must be established by a competent authority, on the basis of objective medical expertise, that the individual is suffering from a genuine mental disorder; (2) the mental disorder must be of a sort that warrants compulsory confinement; and (3) the confinement should continue only during the persistence of the disorder necessitating it.¹²⁶

The subsequent case of *X v. United Kingdom*¹²⁷ concerned an applicant who had been detained in a secure mental hospital following a criminal conviction for the offence of wounding with intent to cause grievous bodily harm. He later received a conditional discharge but was reconfined as the result of an administrative decision by the Home Secretary after X's wife reported to his probation officer that he had become deluded and threatening. Despite the fact that there was no doubt that the Home Secretary's action was taken in response to an emergency, the Court took the position that it was essential to ensure that X's continued detention was necessary and fairly imposed. In the Court's view this required that the detainee be entitled to periodic proceedings by which the lawfulness of his detention could be determined by a court and his release ordered promptly if the detention were found not to be lawful. In a passage which is very relevant to the rights of anyone de-

124. *Id.* at 536, para. 35.

125. 1979 Y.B. EUR. CONV. ON HUMAN RIGHTS 426 (Eur. Ct. of Human Rights), ser. A, no. 47, 2 E.H.R.R. 387.

126. 2 E.H.R.R. at 403, para. 39.

127. 1981 Y.B. EUR. CONV. ON HUMAN RIGHTS 450 (Eur. Ct. of Human Rights), ser. A, no. 46, 4 E.H.R.R. 188.

tained by reason of a mental disorder, the Court held that, even if a detention is originally pursuant to the decision of a court,

a person of unsound mind compulsorily confined in a psychiatric institution for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings at reasonable intervals before a court to put in issue the 'lawfulness' (within the meaning of the Convention . . .) of his detention, whether that detention was ordered by a civil or criminal court or by some other authority.¹²⁸

The Court went on to say that its province is not to determine "the best or most appropriate system of judicial review," and that the contracting states are "free to choose different methods of performing their obligations."¹²⁹ The United Kingdom Government's response was to introduce an amendment to the Mental Health Bill, proceeding through Parliament at the time, to provide mental patients with a right to regular review of the propriety of their continued detention.

Anyone familiar with the extent to which the United Kingdom's civil service in general, and the Home Office in particular, has sought to preserve its executive authority free from judicial review can only approve the impact of this decision. The jurisprudence of the Convention at long last is forcing beams of light into some of the more cobwebbed corners of bureaucratic decision making, ensuring a minimum degree of protection for some of society's most vulnerable members. It may be granted that many people detained on grounds of mental disorder are dangerous and others need to be protected within institutions, but too many cases have come to light in the United Kingdom in which persons have languished in mental hospitals for years in consequence of initial medical authorisation. The fact that some of them undoubtedly would or will have great difficulty in returning to the community upon release should not cause any society to tolerate the unlimited continuation of institutionalisation without any regular process of review.

C. Margin of Appreciation

Cases like *Golder*, *Winterwerp*, and *X v. United Kingdom* are unlikely to promote turmoil outside the ranks of government. Most people will recognise the principles of fairness underlying the Court's reasoning. But in recent years the Court has been presented with a number of cases

128. 4 E.H.R.R. at 207, para. 52. This passage substantially expands the scope of protection under article 5(4).

129. *Id.* at 207, para. 53.

in which it has had to consider the impact of the Convention on the substantive law of member states. As the "high-sounding principles" (to use Lord Denning's phrase) of the European Convention have been brought down to earth, they frequently have arrived with a rather substantial thump. The principal dynamic has been a development of the reasoning adopted by Judge Zekia in the *Wemhoff* case. The Court is looking increasingly at the social and legal practices of member states to identify norms which it is prepared to apply. As the laws and social conventions of a predominant number of states change and develop, so too the norms applied by the Court are developed. This "dynamic" in the jurisprudence of the Court is having a substantial impact on the laws of the United Kingdom and other countries. We shall see shortly how it is developing and how it affects the social and cultural proscriptions of Western European society by looking at some recent decisions of the Court. Before doing so, however, some attention must be paid to the concept of "margin of appreciation" as it is used by the Court.

The phrase "margin of appreciation" is borrowed from French administrative law, in which it is used to describe the extent to which a court will make allowance for the exercise of discretion by a person fulfilling an administrative responsibility. In the context of the Convention, "margin of appreciation" refers to the discretion left to domestic legislators, courts, and executives in creating, interpreting, and applying the laws of their own society. The Court has taken the position that the extent to which the provisions of the Convention allow for a margin of appreciation varies. This seems appropriate; certainly it would be difficult to argue that article 3, which forbids torture or inhuman or degrading treatment or punishment, allows much margin of appreciation of the contracting state. On what ground could one state be afforded greater latitude than another to beat or ill-treat its citizens? Where other and somewhat less absolute rights or obligations under the Convention are concerned, on the other hand, the appropriate breadth of a margin of appreciation is not so clear.

*Handyside v. United Kingdom*¹³⁰ was an example of a less-than-clear-cut case. It involved a publication entitled *The Little Red School Book*, which was aimed at teenagers and, in addition to stressing certain political and social viewpoints, contained references to the innocence of smoking cannabis and the harmless pleasure to be derived from pornography.¹³¹ Handyside, the book's publisher, had been fined and copies of

130. 1976 Y.B. EUR. CONV. ON HUMAN RIGHTS 506 (Eur. Ct. of Human Rights), ser. A, no. 24, 1 E.H.R.R. 737.

131. *See, e.g.*, 1 E.H.R.R. at 746-49, paras. 31-34. Among the book's features noted by the Court in its summary of the English trial court's treatment of the case was the suggestion that

the book destroyed as a result of a prosecution under the Obscene Publications Acts of 1959 and 1964.¹³²

The *Handyside* Court found that the attitudes of European states toward the censorship of literature varied considerably,¹³³ and against this background it was prepared to allow a relatively wide margin of appreciation under article 10 of the Convention. That article protects the right to freedom of expression, but also states that such freedom carries with it certain responsibilities and that its exercise may be subject to limits imposed by law where necessary for, inter alia, the protection of health and morals.¹³⁴ The Court recognised that a substantial degree of discretion must be left to states in determining what amount and kind of censorship is required in their own societies for the protection of health or morals, since

[b]y reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.¹³⁵

This point later was re-emphasized in response to the applicant's pointing out that similar versions of the book freely circulated in most of the

every school ought to have "at least one contraceptive vending machine." *Id.* at 748, para. 34. For further discussion of the *Handyside* case, see Andrews, *Current Survey: Council of Europe: Censorship Under the Obscene Publications Acts: The Handyside Case*, 2 EUR. L. REV. 156, 156-59 (1977).

132. 1 E.H.R.R. at 741-42, paras. 14-17.

133. In fact, the Court stated that "it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals." Rather, views on the subject vary "from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject." *Id.* at 753, para. 48.

134. Article 10 provides as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Eur. Conv. on Human Rights, *supra* note 8, art. 10.

135. 1 E.H.R.R. at 753-54, para. 48 (quoted language refers to article 10(2), *supra* note 134).

member states. The Court stated simply that the fact that a majority of the contracting states had exercised their discretion to permit distribution of the work did not make the contrary decision of the English court into a breach of article 10.¹³⁶

On the other hand, the Court also recognised that freedom of expression is an essential foundation of a democratic society, and that any restriction on it "must be proportionate to the legitimate aim pursued."¹³⁷ Under the circumstances of this case the actions taken by the English authorities were held to be within their margin of appreciation and thus not to constitute a breach of the Convention.

The more recent *Sunday Times* case¹³⁸ also involved the right to freedom of expression, but in this instance the Court was not prepared to give as wide a scope to the domestic margin of appreciation. The situation of which the *Sunday Times* complained arose while litigation was pending in the United Kingdom against the English manufacturer of the drug thalidomide, a sedative prescribed to pregnant women which caused children to be born deformed. In response to the defendant's complaint the Attorney-General obtained an injunction against the *Sunday Times* to prevent it from publishing articles about the tragedy, on the ground that such articles might prejudice the litigation and thus amount to a contempt of court.¹³⁹ The proceedings were settled subsequently and the newspaper then was allowed to proceed with publication.¹⁴⁰

Whereas in *Handyside* the Court stressed that moral requirements have varied and that state authorities are in a better position to determine the exact content of such requirements, in the *Sunday Times* case it took the position that the principle of contempt of court, protecting as it does the fairness and impartiality of trials, operates in an area in which there is a more closely defined European norm. In the latter case, an almost evenly divided Court essentially found that the idea of the au-

136. *Id.* at 759, para. 57.

137. *Id.* at 754-55, para. 49.

138. *The Sunday Times v. U.K.*, 1979 Y.B. EUR. CONV. ON HUMAN RIGHTS 402 (Eur. Ct. of Human Rights), ser. A., no. 30, 2 E.H.R.R. 245. For more extended discussion of this case than is appropriate in the limited context of illustrating the concept of margin of appreciation, see Andrews, *Current Survey: Council of Europe: The Sunday Times Case*, 4 EUR. L. REV. 317, 317-21 (1979).

139. The original injunction was sought and granted against publication of a particular article which discussed the issue of the defendant company's negligence. [1973] Q.B. 710. The order was expanded as the result of a subsequent appeal to the House of Lords, and in its amended form it barred publication by the *Sunday Times* of *any* article dealing with the issues of negligence, breach of contract, or breach of duty on the part of the manufacturer. 1974 A.C. 273.

140. 2 E.H.R.R. at 249-54, paras. 8-16.

thority and impartiality of the judiciary is a more objective notion than is that of the protection of morals.¹⁴¹ This led the majority to adopt a much more "interventionist" approach to article 10 than it had in *Handyside*.

In reaching the decision that the restraint on publication in the *Sunday Times* case violated article 10, a majority of the Court noted that provisions like article 6 reflect "a fairly substantial measure of common ground" in the law of signatory states as to what the "authority of the judiciary" might entail,¹⁴² but that there are no equivalent provisions regarding morals.¹⁴³ "Accordingly," the Court concluded, "a more extensive European supervision corresponds to a less discretionary power of appreciation."¹⁴⁴

As a concluding note on the *Sunday Times* case and an introduction to the next section, it ought to be remarked that within a matter of months after the Court's decision the United Kingdom Parliament passed an act reforming the law of contempt of court.¹⁴⁵ The effect of the reform was to bring the authority of English courts to grant civil injunctions against newspapers more closely into line with the Convention as interpreted in the *Sunday Times* case.¹⁴⁶

D. *The Social and Cultural Dynamic of the Convention*

The cases that best illustrate the dynamic element in the Convention are those in which the Court has responded to changing European norms. There are a number of these and we will look at several of the most significant.

In *Republic of Ireland v. United Kingdom*¹⁴⁷ the Court held that five so-called "techniques of interrogation" used in Ulster amounted to inhuman and degrading treatment. Those techniques consisted of: (a) *wall standing*, in which the detainee was forced to stand for hours spread-eagled against a wall with his feet back from the wall and apart, causing him to rest his weight principally on his fingers and toes; (b) *hooding*, in

141. See *id.* at 275-76, para. 59. The Court held by a vote of 11 to 9 that, although the restraint was "imposed by law" to achieve a "legitimate aim," it was not "necessary" to protect the authority of the judiciary, and thus violated article 10. *Id.* at 273, para. 53, 275, para. 57, 281-82, paras. 66-68.

142. 2 E.H.R.R. at 276, para. 59.

143. *Id.* See also *supra* note 133.

144. 2 E.H.R.R. at 276, para. 59.

145. Contempt of Court Act, 1981, ch. 49.

146. Under the Act, for example, publication is treated as contempt of court only when it "creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced." *Id.* § 2-(2).

147. 1978 Y.B. EUR. CONV. ON HUMAN RIGHTS 602 (Eur. Ct. of Human Rights), ser. A, no. 25, 2 E.H.R.R. 25.

which a dark blanket was put over the detainee's head; (c) *subjection to noise*, which involved putting the detainee in a room with a continuous loud hissing noise; (d) *deprivation of sleep*; and (e) *deprivation of food and drink*, reducing the diet of detainees to a pint of water and a slice of bread at six hourly intervals in some cases.¹⁴⁸ The Commission had taken the view that the techniques amounted to torture within the meaning of article 3 of the Convention. The majority of the Court, however, was not prepared to hold that the techniques amounted to torture, which it distinguished from inhuman or degrading treatment by arguing that in using the former term the drafters of the Convention had intended to attach "a special stigma" to behaviour characterised by "deliberate inhuman treatment causing very serious and cruel suffering."¹⁴⁹ The distinction drawn by the majority of the Court was based primarily upon the degree of intensity of the suffering inflicted, and in its view the suffering caused in this case was not sufficient to warrant use of the term "torture."

The Commission and the majority of the Court agreed that the practices involved amounted to inhuman and degrading treatment. The Commission thought that they did, and looked to the contemporary practices of other European states in so finding.¹⁵⁰ The Court nearly unanimously agreed.¹⁵¹ The British Judge, Sir Gerald Fitzmaurice, was the sole dissenter from the judgment of the Court on this point. He noted that the Convention was drafted with appreciation of the then recent horrors of the Second World War, and argued that it was fair to assume that when the Convention was signed the words "torture" and "inhuman and degrading treatment" might reasonably have been construed to refer to the sort of brutal excesses associated with the Second World War and not to the sophisticated but less brutal techniques of interrogation such as had been employed in Northern Ireland in the face of a national emergency.¹⁵² Judge Fitzmaurice took strong exception to what he viewed as the Court's conscious aim of "developing" the Convention in light of current practices, an undertaking which he regarded as outside the Court's proper judicial function and not required by the Convention. He argued rather that, especially in light of the absolute character of the prohibition imposed by article 3, the term "torture" as used within that article ought to be construed to reach only those prac-

148. See 2 E.H.R.R. at 59, para. 96, 130, para. 19.

149. *Id.* at 80, para. 167.

150. Republic of Ireland v. U.K., Eur. Comm'n on Human Rights, appl. no. 5310/71, para. 402.

151. 2 E.H.R.R. at 80, para. 167. The vote on this point was 16 to 1.

152. 2 E.H.R.R. at 127, para. 17 (Fitzmaurice, J., dissenting).

tices easily recognised as such, and not those "lesser forms of ill-treatment" that, while worthy of censure, would not have been classified instinctively as torture.¹⁵³

In addition to the two opposing theories or philosophies of interpreting the Convention found in the majority opinion and in Judge Fitzmaurice's dissent, *Ireland v. United Kingdom* also contains a political lesson. Long before the case reached the Court the United Kingdom Government had given directions that the five techniques should not be used; indeed, the prevailing view within the United Kingdom was that the Republic of Ireland had been unwise and unneighbourly in pressing the case. The Irish Government was under political pressure, however, and apparently felt that it could not be seen to fail in its duty to protect the rights of Catholics in Ulster. Ultimately the Irish Government was the loser, since the Commission in its own report had been of the opinion that the practice amounted to torture. In effect the Court moved away from that position but condemned the practices nonetheless.

A more significant case in terms of establishing European norms of behavior under more normal circumstances was *Tyrer v. United Kingdom*.¹⁵⁴ This case involved the infliction of a sentence of corporal punishment by a court in the Isle of Man, one of the few places in Western Europe where a court still has authority to impose such a sentence. The applicant was a fifteen-year-old who had been convicted, along with three other boys, of unlawful assault on a senior pupil at his school. He was sentenced to be birched and was given three strokes.

Both the Commission and the Court thought that there were no significant social or cultural differences between the Isle of Man and the United Kingdom, and that historically, geographically, and culturally the island had always been considered a part of the European family of nations.¹⁵⁵ In the Court's view it thus should be regarded as sharing the "common [European] heritage of political traditions, ideals, freedom and the rule of law" to which the Convention's preamble refers.¹⁵⁶ The fact that corporal punishment had a lengthy history in the Isle of Man and had popular support there as a method of dealing with violent teenage crimes was not deemed sufficient to justify a special Manx exception to article 3 for a form of punishment that had come to be commonly

153. *Id.* at 127, paras. 16-17.

154. 1978 Y.B. EUR. CONV. ON HUMAN RIGHTS 612 (Eur. Ct. of Human Rights), ser. A, no. 26, 2 E.H.R.R. 1.

155. 2 E.H.R.R. at 13, para. 38.

156. *Id.*

regarded as degrading.¹⁵⁷

The *Tyrer* opinion did not go so far as to state explicitly that all forms of corporal punishment violate article 3 of the Convention. The Court took notice of the way in which judicial birching is practised on the Isle of Man, involving a delay between sentence and punishment and the convicted person's being asked to remove his trousers and underwear and being held down by police officers.¹⁵⁸ In his dissenting opinion, however, Judge Fitzmaurice pointed out that the majority had carefully negated the idea that "[t]he indignity of having the punishment administered over the bare posterior . . . was . . . the only or determining factor" in its judgment.¹⁵⁹ For his part, Judge Fitzmaurice stressed the fact that the applicant was a juvenile when sentenced and punished, and argued that indignities against the person in the course of punishment traditionally have been considered more acceptable in the case of juveniles than in that of adult offenders, and the absolute proscription of article 3 ought to be construed in light of tradition.

As for the impact of this decision on domestic law, judicial birching had not been practised elsewhere in the United Kingdom for years prior to *Tyrer*. When in 1981 the United Kingdom renewed the right of its citizens to make individual appeal to the Commission, it excluded application of the right to the Isle of Man.¹⁶⁰ It is nevertheless the case that since the decision of the Court in *Tyrer* there has not been another birching on the island.

Complaints involving corporal punishment since *Tyrer* have arisen largely from its use in schools. In *Campbell & Cosans v. United Kingdom*¹⁶¹ the Court held that, where the parents of school children oppose the use of corporal punishment, any infliction of such punishment in a state school is a denial of the right of parents under article 2 of the first protocol to ensure that the education and teaching of their children conforms to "their own religious and philosophical convictions."

Again we can see the dynamic of development within the Convention, since it is very unlikely that those who framed article 2 of the first

157. *Id.* at 10, para. 31, and 13, para. 38.

The Court noted, in fact, that it is possible that many Manxmen who supported corporal punishment did so precisely *because* they regarded it as degrading of aggressive teenage delinquents. 2 E.H.R.R. at 10, para. 31.

158. 2 E.H.R.R. at 11-12, paras. 33, 35.

159. *Id.* at 22, para. 9(v) (Fitzmaurice, J., dissenting) (quoting *id.* at 12, para. 35).

160. 1981 Y.B. EUR. CONV. ON HUMAN RIGHTS 12 (United Kingdom Declaration under art. 25 dated 19 August 1981); *id.* at 14 (Annexe dated 4 December 1981); *cf.* 1967 Y.B. EUR. CONV. ON HUMAN RIGHTS 12, 12-16 (United Kingdom Declaration under art. 25 dated 12 September 1967).

161. Eur. Ct. of Human Rights, ser. A, no. 48, 4 E.H.R.R. 293 (1982).

protocol had regard to the way in which discipline would be maintained in schools. It is much more likely that they had in mind the content of what was taught, and were seeking to ensure that this would not include material offensive to the religious beliefs and philosophical principles of parents. We have here an illustration of how a clause of the Convention may be given a very wide interpretation with a substantial social and cultural impact on a signatory state. The United Kingdom Government pointed out to the Court some of the difficulties which would result from the *Campbell & Cosans* decision.¹⁶² It would be very difficult, for instance, to impose corporal punishment on some children whose parents were not philosophically opposed to it, whilst forbearing to use the same punishment on others because of the conviction of their parents. It would add substantially to the cost of education if children were required to be educated in separate classes according to parental conviction. Due in large part to such problems, the United Kingdom Government has not yet reacted to the decision, though there are hints that legislative reforms are being contemplated. Meanwhile, however, an increasing number of British local education authorities restrict the use of corporal punishment and in some cases ban it altogether, though traditionally it has been common in Scottish schools and still is used in some English schools.

One ought not to infer from the cases cited above that the United Kingdom is the only country to have violated the Convention. One of the most important and wholly good decisions of the Court was in *Marckx v. Belgium*,¹⁶³ a case involving discrimination against an illegitimate child.

Under the then existing Belgian law the birth of a child to an unmarried mother gave rise to no legal bond. Registration of the birth was not in itself sufficient to establish maternal affiliation; that required a formal act of voluntary recognition by the mother or the taking of legal proceedings by the child within five years of attaining his or her majority.¹⁶⁴ Even after formal recognition, the illegitimate child had a limited relationship, since the legal bond existed solely between the mother and child and did not exist vis-à-vis other members of the mother's family.¹⁶⁵ The illegitimate child had no right of inheritance from the mother's family, nor from the father or his family.¹⁶⁶ Even from the

162. See, e.g., *id.* at 305, para. 37.

163. 1979 Y.B. EUR. CONV. ON HUMAN RIGHTS 410 (Eur. Ct. of Human Rights), ser. A, no. 31, 2 E.H.R.R. 330.

164. 2 E.H.R.R. at 335-36, para. 14.

165. *Id.* at 336-37, para. 16.

166. *Id.* at 337, para. 17.

mother the rights of inheritance were limited. To provide him with equal rights of succession the mother would have to adopt her illegitimate child, and even that would not give him a right of intestacy vis-à-vis estates of the mother's relatives.¹⁶⁷

In fairness to Belgium it must be noted these appalling laws were in the process of being reformed at the time of the Court's judgment in the *Marckx* case.¹⁶⁸ Within recent years many western European states have adopted legislation to remove unpleasant discriminations against illegitimate children,¹⁶⁹ and in 1975 the member states of the Council of Europe agreed to a Convention on the Legal Status of Children Born out of Wedlock.¹⁷⁰ At the time of the *Marckx* case, however, only ten states had signed the Convention and a mere four had ratified it.¹⁷¹

As we have seen, article 8(1) of the Convention provides that everyone has the right to respect for his private and family life.¹⁷² The substantive rights guaranteed by the Convention also are protected by article 14, which provides that "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." In a powerful dissenting opinion in the *Marckx* case Judge Fitzmaurice argued that article 8 is concerned primarily with what he called the "domiciliary protection" of the individual. He argued that it is intended to protect against arbitrary police raids, intrusions, and questioning, against the planting of bugging devices, interference with domestic services, and like matters.¹⁷³ But the Court, to its credit, decided that the relationship between an illegitimate child and its natural relatives clearly is encompassed by the concept of family life as contained in article 8.¹⁷⁴ Once this step was taken it followed that there had been a violation of article 14, since the Belgian laws in question obviously discriminated against the illegitimate child's enjoyment of family life on the ground of status at birth.

167. *Id.* at 338, para. 19.

168. *Id.*, para. 20.

169. See Krause, *Creation of Relationships of Kinship*, in 4 INT'L ENCYCLOPEDIA OF COMP. L. ch. 6, 10-12 (A. Chloros ed. 1976).

170. European Treaty Series, No. 85.

171. Eekelaar, *Reforming the English Law Concerning Illegitimate Persons*, 14 FAM. L.Q. 41 (1980).

172. See *supra* note 10.

173. 2 E.H.R.R. at 366, para. 7 (Fitzmaurice, J., dissenting). His opinion ought to be read in the light of previous occasions on which he argued that the Convention should be interpreted in light of the climate in 1950, at which time most states in western Europe discriminated against the illegitimate child. See, e.g., *supra* notes 123, 152-53 and accompanying text.

174. 2 E.H.R.R. at 344-45, paras. 36-37.

The Court's decision in the *Marckx* case was a good one which provided the final encouragement to Belgium to rid itself of pernicious rules regarding illegitimate children. It also presented the clearest illustration to date of the extent to which rights under the Convention come to be rewritten as European social attitudes change, and it demonstrated the significant impact that development of the Convention may have upon the laws of member states.

Another case confirming this is *Dudgeon v. United Kingdom*.¹⁷⁵ The *Dudgeon* Court ruled that a total prohibition on acts of sodomy and of gross indecency between adult males under the law of Northern Ireland was a breach of article 8 of the Convention, as it failed to recognise the right to respect for private life.¹⁷⁶ Here again the Court found a particular application that could not have been in the contemplation of those responsible for drafting the article in 1950, since prohibitions on homosexual conduct of any kind were widespread in Europe at that time.¹⁷⁷

Once it had accepted the argument that homosexual relationships could be a matter of private life, the only issue for the *Dudgeon* Court was whether proscription of those relationships is necessary in a democratic society in the interest of public order or morals.¹⁷⁸ The Court was divided on the question of the proper application of the doctrine of margin of appreciation in this case. Two judges, Judge Zekia of Cyprus and Judge Walsh of Ireland, sought to emphasise the extent to which Christian and Moslem values still united in condemning homosexuality and other unnatural sexual relationships.¹⁷⁹ A majority of the Court clearly was convinced that the European norm had moved on, however, and was not prepared to apply the same wide margin of appreciation it had afforded to the United Kingdom in the earlier *Handyside* case.¹⁸⁰ In the Court's words:

[N]ot only the nature of the aim of the restriction but also the

175. 1981 Y.B. EUR. CONV. ON HUMAN RIGHTS 444 (Eur. Ct. of Human Rights), ser. A, no. 45, 4 E.H.R.R. 149.

176. 4 E.H.R.R. at 161-62, para. 41.

177. Since 1967, homosexual acts between consenting male adults over the age of 21 conducted in private have been outside the compass of the criminal law in England and Wales. A similar rule was introduced in Scotland in 1980, but at the time of the *Dudgeon* case there was a total proscription on homosexual acts in Ulster. Attempts to liberalise the law had been prevented by the forces parading under the banner of the Reverend Ian Paisley's crusade to "Save Ulster from Sodomy."

178. Of course it could be argued that since homosexual relationships by definition involve more than one person they are not a matter of private life, but this issue was not pursued and it is unlikely that the argument would have gained many adherents on the Court.

179. 4 E.H.R.R. at 171, para. 1, (Zekia, J., dissenting); *id.* at 185, para. 16, (Walsh, J., dissenting).

180. *See supra* note 133 and accompanying text.

nature of the activity involved will affect the scope of the margin of appreciation. The present case concerns the most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interference on the part of the public authority can be legitimate for the purposes of paragraph 2 of Article 8.¹⁸¹

In other words, the Court limited the margin of appreciation by pertinent application of the principle that a much wider power justifiably may be allowed for legislation with respect to public aspects of morality than for restrictions on the private conduct of individuals.

This is not to say that no degree of discretion is left to signatory states in controlling homosexual conduct. The Court has recognised that states have a responsibility to protect the young and the impressionable,¹⁸² and neither the Court nor the Commission have held that prohibition of homosexual relationships between an adult person and someone under the age of twenty-one violates the Convention. The age limit for proscribing homosexual conduct varies in western European countries between sixteen and twenty-one, and the United Kingdom Government has since legislated to bring the law of Northern Ireland into line with that of England and Wales, which incorporates a twenty-one-year limit.

So far most countries have responded as has the United Kingdom and have amended their laws or their executive practices to take account of the decisions of the Court. The countries least likely to be able or willing to bring their laws into line with jurisprudence under the Convention are precisely the ones that have not recognised the right of individual petition.¹⁸³ Some states also have made specific reservations regarding certain provisions in the Convention.¹⁸⁴ So for example Liechtenstein, the most recent state to ratify the Convention, deposited several reservations with its ratification. Its reservation in connection with the obligation of respect for private life under article 8 qualifies that obligation with respect to homosexuality and the status of illegitimate children, women, and aliens, so as to accord with existing principles of Liechtenstein law.¹⁸⁵

Eventually, however, there may come a time when a contracting

181. 4 E.H.R.R. at 165, para. 52.

182. *Id.* at 168, para. 62; *see also* Reports of the Commission in *X v. Ger.*, Eur. Comm'n on Human Rights, appl. no. 5935/72; *X v. U.K.*, Eur. Comm'n on Human Rights, appl. no. 7215/75; Andrews, *Current Survey: Council of Europe: Homosexual Rights in the United Kingdom*, 5 EUR. L. REV. 513, 515-17 (1980).

183. Turkey, Greece, Malta, and Cyprus do not recognise this right. *See supra* note 26.

184. *See supra* note 13.

185. *See Andrews, Current Survey: Council of Europe*, 8 EUR. L. REV. 144 (1983).

party will feel unable to bring its laws into conformity with evolving norms under the Convention. It is possible that, if such a major test occurs, it will be in the Republic of Ireland. In *Airey v. Ireland*¹⁸⁶ the Court held that the Irish Government violated articles 6 and 8 of the Convention by denying legal aid to Mrs. Airey in her attempt to obtain a judicial separation from her husband. In the Court's view the government's refusal to provide legal aid in the civil matter operated effectively to deny Mrs. Airey the remedy of judicial separation, since she was unable to afford the cost of representation and the legal procedure was too complicated for an individual litigant to follow without assistance.¹⁸⁷ The Court therefore held that denial of legal aid amounted to a denial of the applicant's right of access to a court for the determination of her civil rights under article 6(1) as construed in *Golder*.¹⁸⁸ The Court also qualified the right involved, however, by stating that legal aid may not have to be provided where procedures are simple enough for a litigant to be able to appear effectively on his or her own behalf.¹⁸⁹

It should be remembered that legal aid was something of a rarity in Europe in 1950 when article 6 was drafted; certainly it was far from being available as of right whenever needed, and indeed that probably still is the case today. Once again, then, we see illustrated the dynamic of the Convention's development. There is, moreover, another aspect of the *Airey* decision that holds even greater potential significance for the future of the jurisprudence of the Convention and its interaction with domestic laws: By a bare majority of four to three the *Airey* Court also held that the Irish Government's failure to provide legal aid breached its obligation under article 8 to respect Mrs. Airey's private and family life.¹⁹⁰ The majority reasoned that this article not only compels the state to abstain from actively interfering with family life, but also may impose "positive obligations inherent in an effective respect for private

186. 1979 Y.B. EUR. CONV. ON HUMAN RIGHTS 420 (Eur. Ct. of Human Rights), ser. A, no. 32, 2 E.H.R.R. 305.

187. 2 E.H.R.R. at 314-15, para. 24, 317-18, para. 27.

188. *Id.* at 314, para. 22, 318, para. 28. The Irish judge dissented on the ground that absence of legal aid was not in itself a "bar or impediment on Mrs. Airey's seeking access to the High Court" to obtain a judicial separation. *Id.* at 322, para. 3 (O'Donoghue, J., dissenting). Another judge dissented on similar grounds, arguing for a narrower construction of article 6(1) than that adopted by the majority. *Id.* at 326-27, paras. 2-5 (Vilhjalmsson, J., dissenting).

189. *Id.* at 316-17, para. 26.

190. *Id.* at 319, para. 33. Again, Judge O'Donoghue was among the dissenting members of the Court, and Judge Vilhjalmsson's dissenting opinion went so far as to characterise the majority's interpretation of article 8 as "far-fetched." *Id.* at 327, para. 6 (Vilhjalmsson, J., dissenting).

or family life.”¹⁹¹ Among those obligations is that of making relief from the legal duty of cohabitation “effectively accessible” when a marriage is breaking up and either partner wishes to be relieved of the duty to cohabit with the other.¹⁹²

It is difficult to see how the logic of the “private and family life” argument can be stopped at the point of requiring that states afford access to the existing remedy of judicial separation, and not be taken further to require that they afford the remedy itself or even the remedy of divorce. Those remedies provide different degrees of the same kind of relief: whereas the former relieves parties from a duty to cohabit, the latter restores total independence from the unwanted spouse and permits entry into a fresh marriage and a new family life if desired.¹⁹³ This argument is even stronger if one party to the first marriage already is living with another by whom he or she has had children. If the Court is prepared to recognise a right to obtain severance of the obligation to cohabit with the first spouse, then it is prepared to give that right of severance precedence over marital obligations. It would seem then to be a relatively short step to extending the protection of article 8 to the family life associated with a subsequent extra-marital relationship.

The fact that the Irish proscription on divorce arises out of Catholic doctrine and is enshrined in the country’s constitution¹⁹⁴ may not be sufficient to save it. The tenor of the Court’s decisions in cases like *Marckx* has been to give a positive effect to the Convention in the face of rules that clearly are unjust and discriminatory,¹⁹⁵ and decisions like *Dudgeon* indicate that the Court is not inclined to recognise the legitimacy of proscriptions arising out of long-term cultural prejudices or confirmed patterns of behaviour.¹⁹⁶ The Irish proscription on divorce effectively thwarts those who wish to have the benefit of an opportunity which would be available to them in most other states in western Europe, and whether it would be viewed as prejudicial or otherwise unwor-

191. *Id.* at 319, para. 32.

192. *Id.*, para. 33.

193. The majority’s opinion notes that “protection of private or family life may sometimes necessitate [spouses’] being relieved from the duty to live together.” *Id.* This language at least suggests that if Ireland had not had an existing remedy of judicial separation it might have been required to create that remedy under article 8. Would such reasoning extend to the more drastic remedy of divorce? Judge O’Donoghue may have feared that it would, since he noted that “I am not aware that it has ever been contended that divorce legislation is either required or prohibited by any article of the Convention.” *Id.* at 323, para. 9 (O’Donoghue, J., dissenting).

194. Article 41.3.2° of the Irish Constitution provides that “[n]o law shall be enacted providing for the grant of a dissolution of marriage.”

195. See *supra* notes 163-74 and accompanying text.

196. See *supra* notes 175-81 and accompanying text.

thy of precedence over competing individual rights is an open question.¹⁹⁷

Ultimately there must be some limitation on the extent to which the interpretation and development of rights under the Convention can be allowed to intrude into the established social doctrines and conventions of member states. The *Airey* case has not disturbed a hornet's nest, confining itself as it does to consideration of the applicability of an existing remedy under Irish law, but it contains in its arguments some themes which will require careful consideration by the Court in future cases. These could lead to direct confrontation between the right to privacy, independence, and freedom of the individual on the one hand and the conventions and moral dictates of the state on the other.

Another and potentially more explosive case was defused by the refusal of the Court to rule on its merits. The applicant in *Van Oosterwijck v. Belgium*¹⁹⁸ was born in 1944 with female physical characteristics and was registered as a female. Psychologically he always saw himself as a male person, however, and between 1969 and 1973 he underwent hormone therapy and a series of operations the effect of which was to change his sexual characteristics substantially to those of a male person.¹⁹⁹ He then sought to have his entry in the Belgium civil status register amended so as to record his new sex. A Belgian court dismissed his case on the ground that the original entry was correct,²⁰⁰ and he failed to take his case to the final court in Belgium, the Cour de Cassation. The European Court of Human Rights ruled by a thirteen-to-four majority that his case should be dismissed on the ground of failure to exhaust domestic remedies.²⁰¹

197. It could be argued that the Irish ban on divorce is necessary for the protection of morals or the rights and freedoms of others in the democratic society of the Republic of Ireland, and thus that the ban is permissible under article 8(2). (Divorce is unlikely to undermine the Irish national security, public safety, or economic well being, and thus the other grounds on which interference with private and family lives may be justified appear to be inapplicable.) As already noted, however, the Court tends to look to the contemporary practices of other signatory states when determining what margin of appreciation to allow any single state under the Convention. See *supra* text accompanying notes 130-36. The trend among signatory states is away from the strict position maintained by Ireland in matters of marital dissolution, and that position therefore may be vulnerable.

198. 1980 Y.B. EUR. CONV. ON HUMAN RIGHTS (Eur. Ct. of Human Rights), ser. A, no. 40, 3 E.H.R.R. 557.

199. 3 E.H.R.R. at 560-61, para. 9-11.

200. *Id.* at 561, para. 12.

201. *Id.* at 572, para. 41. The Commission, however, had been of the opinion that the applicant's rights under articles 8 and 12 of the Convention had been violated. See *Van Oosterwijck v. Belg.*, 1978 Y.B. EUR. CONV. ON HUMAN RIGHTS 476 (Eur. Comm'n on Human Rights), appl. no. 7654/76; Andrews, *Current Survey: Council of Europe: Human Rights Cases*, 6 EUR. L. REV. 67, 67-69 (1981). Article 12 provides: "Men and women of marriageable age

This case raised fascinating issues which were not explored by the Commission in its opinion and which the Court avoided by failing to reach the merits. Not the least difficult of these would arise when someone already married, perhaps with natural or adopted children, underwent a similar operation. If such a person were able to register a change of sex, what effect would it have on his or her marriage? Could the marriage be considered to have continuing validity if both parties to it were registered as males or females? Arguably the state would be justified in refusing to register a change of sex in such cases "for the protection of the rights and freedoms of others," i.e., the spouse or children of the marriage. Indeed, the state might be justified in forbidding such operations altogether in circumstances where they could be destructive of family life. These problems illustrate the conflicts that can arise when liberal tolerance of minorities and deviants clashes with social realities. Clearly there is no easy solution, but the course taken by the *Van Oosterwijck* Court, which was to avoid expressing a view on the merits of the case, can amount only to postponing the difficulty of grappling with these issues.

E. Jurisprudence of the Commission of Human Rights

Opinions of the Commission obviously carry less weight than judgments of the Court. They are not the product of adjudication and are not binding on the parties to a dispute, as are decisions of the Committee²⁰² and judgments of the Court.²⁰³ To note this is not to denigrate the Commission's opinions and reports, however, since they form a principal part of the dossier forwarded to the Court in many of the most important cases, and the views of the Commission are argued to the Court just as are those of the High Contracting Party or Parties involved.²⁰⁴ Moreover, there have been some important opinions of the Commission in cases which have not proceeded to the Court, opinions to

have the right to marry and to found a family, according to the national laws governing the exercise of this right." Eur. Conv. on Human Rights, *supra* note 8, art. 12.

The Commission was unanimous that the state's refusal to change the applicant's registration violated his right to respect for private life under article 8, whilst on the issue of his right to marry it split seven to four. The latter position is rather puzzling, since under existing Belgian law the applicant was registered as female and clearly could not marry another woman, but by reason of his psychological and physical condition it had now become inconceivable that he could marry a man. Of course there was no question of depriving him of his right to found a family, outside the possibility of adoption within marriage; remarkable though his medical treatment was, it had its limits.

202. Eur. Conv. on Human Rights, *supra* note 8, art. 32(4).

203. *Id.* art. 53.

204. *See, e.g.*, Rules of the Eur. Ct. of Human Rights, 1958-59 Y.B. EUR. CONV. ON HUMAN RIGHTS 2, rules 29, 38(1), 42(2).

which member states have responded by changing their laws and practices. We shall focus on a few such decisions dealing with two sorts of rights or freedoms under the Convention: the right to marry and the right to life.

1. *Marriage Rights*.—The opinions of the Commission in two cases, *Hamer v. United Kingdom*²⁰⁵ and *Draper v. United Kingdom*,²⁰⁶ are of particular interest. The Commission found in both cases that the United Kingdom Government violated the Convention by denying prisoners the right to marry whilst serving their sentences.

Draper had been sentenced in 1974 to life imprisonment on a charge of murder in the course of robbery, with a recommendation that he serve a minimum of twenty-five years in prison. The Commission rejected the argument that interference with Draper's right to marry was justified because, even if he had been allowed to marry when he first made application in 1977, his new relationship could not have had substance until his release in 1999.²⁰⁷ Rather, the Commission unanimously took the view that the right protected by article 12 is a right to form a legally binding association between a man and a woman, a right which could not be denied the applicant: "It is for [the parties themselves] to decide whether or not they wish to enter into [a marriage] in circumstances where they cannot cohabit."²⁰⁸ The Commission also noted that no issues of public interest stood in the way of such a union in the circumstances of *Hamer* or *Draper*.²⁰⁹

The United Kingdom Government challenged the Commission in *Draper* to say whether the right to marry should extend to prisoners convicted of sexual and serious domestic offences, prisoners whose marriage or remarriage might outrage public opinion.²¹⁰ As might be expected the Commission ducked this issue, noting that its function is not to

205. Eur. Comm'n on Human Rights, appl. no. 7114/75, 24 Decisions & Reports 5, 4 E.H.R.R. 139 (1979).

206. Eur. Comm'n on Human Rights, appl. no. 8186/78, 24 Decisions & Reports 72 (1980).

207. 24 Decisions & Reports at 81, paras. 59-60.

208. *Id.* at 81, para. 60.

209. *Id.* at 16, para. 72, 81, para. 61. The facts of *Hamer* are similar to those of *Draper*, and in fact the Commission heard the cases at the same time. Whereas Mr. Draper had received a life sentence, Mr. Hamer had been sentenced to five years. *Id.* at 8, para. 13. He would not have been eligible for parole for some 15 months after the date of his original request for permission to leave the prison to be married. The applicant was released more than two years later, having been denied the earliest possible parole, and in the meantime his erstwhile intended had married someone else. *Id.* at 16, para. 70. In Mr. Hamer's case, therefore, the interference with his right to marry resulted from the state's imposition of a substantial delay on its exercise, but the delay was of a much shorter and more definite duration than in the case of Mr. Draper.

210. *Id.* at 81-82, para. 62.

express an opinion *in abstracto*. It did suggest in dicta, however, that restriction on the right to marry might be justified in certain cases on the basis of public interest.²¹¹

Until the United Kingdom Government responded to the opinions in these cases by amending its prison rules, it was rare indeed for British prisoners to be allowed to marry except where this was necessary to ensure the legitimacy of a child.²¹² Readers may draw their own conclusions as to whether availability of marriage to prisoners is desirable. Many argue that marriage provides the prisoner with a measure of security and emotional stability during his sentence and on his release, whilst others say that such marriages are essentially unstable and, insofar as the prisoner is responsible for his circumstances, he has no right to complain. There is some truth and a large amount of over-generalisation in both views. It is sufficient to note here that in reaching its decisions the Commission found "relevant . . . the general tendency in European penal systems in recent years towards reduction of the differences between prison life and life at liberty and the increasing emphasis laid on rehabilitation."²¹³

2. *Right to Life*.—Unlike the United States Supreme Court,²¹⁴ the European Court of Human Rights has not been squarely faced with issues involving the right to life. The Commission has dealt with such cases, however, and there is little doubt that the Court itself will be faced with them over the next few years.

In *Bruggemann & Scheuten v. Federal Republic of Germany*²¹⁵ the applicants complained that German law limiting the availability of abortion violated their right to respect for their private and family lives,²¹⁶ arguing with obvious logic that sexual relations and family planning came within the sphere of private and family life and that criminal sanctions constituted interference.

The case could have raised issues as central as those that have taxed the United States Supreme Court ever since its decision in *Roe v.*

211. *Id.*

212. *See, e.g., id.* at 77, para. 25.

213. *Id.* at 78, para. 44.

214. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973).

215. Eur. Comm'n on Human Rights, appl. no. 6959/75, 10 Decisions & Reports 100, 3 E.H.R.R. 244 (1977).

216. The laws in question permitted abortion only when the mother's life or health was at risk, when there was a risk of the child being born incurably ill, when the pregnancy was the result of a criminal offence against the mother, or when it was otherwise advisable in order to avert the danger of severe distress to the mother threatened by a continued pregnancy. *Id.* at 249-50 (quoting the Fifteenth Criminal Law Amendment Act (Fünfzehntes Strafrechtsänderungsgesetz)).

Wade.²¹⁷ For example, the right to private and family life under article 8 can be restricted as far as is necessary in a democratic society for the protection of the rights and freedoms of others. Is the foetus "another" within the meaning of that phrase? Similarly, article 2 of the Convention provides that "[e]veryone's right to life shall be protected by law." Is the unborn child a person and its physical viability a life within the contemplation of article 2? The Commission seemed to move tentatively toward accepting the idea that the unborn child is of some juridical significance. It noted that the unborn child often has rights of inheritance,²¹⁸ although it failed to note that these remain inchoate until birth, a factor which must be significant. It similarly noted that the United Nations Covenant on Civil and Political Rights prohibits the execution of death sentences on pregnant women,²¹⁹ although that argument is largely a humanitarian one and does not directly concern the status of the foetus.

Ultimately, however, the Commission took the view that the issue of pregnancy and its termination is not solely a matter within the private life of the mother. It noted that every contracting state imposes some restrictions on the right to abortion.²²⁰ These vary from Sweden, which has an unqualified right of abortion during the first eighteen weeks of pregnancy, to countries like Ireland, Malta, and Greece, where abortions rarely are allowed.²²¹ In this respect German law was not seriously out of line with that of other member states, and thus the Commission deemed German law to be within the limits of discretion contemplated by the framers of the Convention.²²² Perhaps this result reflects a general Western European law which, "for the protection of health or morals," allows states to limit the private right of a pregnant woman to an abortion. In any event the right to life of the foetus was not at issue in this case.

More recently in *X v. United Kingdom*²²³ the Commission heard from

217. 410 U.S. 113 (1973). The parallel between the function of the Supreme Court and the European Court of Human Rights in defining the boundaries of human rights and individual freedoms is striking, but the European Court and Commission have been provided with an express right to privacy in Article 8 of the Convention. They did not have the problem of "teasing" a right of privacy out of a constitutional instrument, and thus there is no European case corresponding to *Griswold v. Connecticut*, 381 U.S. 479 (1965).

218. 10 Decisions & Reports at 116, para. 60.

219. *Id.*

220. *Id.* at 116-17, para. 61.

221. See Report of the Commission in *Brüggemann and Scheuten v. Ger.*, Eur. Comm'n on Human Rights, appl. no. 6959/75, app. V (1977).

222. 10 Decisions & Reports at 117, para. 64.

223. Eur. Comm'n on Human Rights, appl. no. 8416/79, 19 Decisions & Reports 244 (1980).

an applicant who complained of being unable to prevent his wife from obtaining an abortion. Without success he had sought to obtain from an English court an injunction against her and the manager of a nursing home at which it was proposed to carry out the abortion. His case was a weak one, since his argument that the abortion breached his own right to "private and family life" clearly was at odds with his wife's right to respect for her private life in which she sought to have the pregnancy terminated. The Commission opined that the rejection of the husband's petition for an injunction was justified under article 8(2) because it was necessary for the protection of the rights of the mother, and rejected the complaint based on that article as "manifestly ill-founded."²²⁴ In an important passage the Commission stated that, in view of the rights of the pregnant wife,

the husband's and potential father's right to respect for his private and family life can[not] be interpreted so widely as to embrace such procedural rights as claimed by the applicant, i.e. a right to be consulted, or a right to make applications, about an abortion which his wife intends to have performed on her.²²⁵

On this and other grounds the application was declared to be inadmissible.

The father also argued the rights of the unborn child in accordance with the text of article 2(1) of the Convention, which provides that "[e]veryone's right to life shall be protected by law." The terms "everyone" and "no one" appear in all but one of the articles of the Convention which set out the basic rights and freedoms to be protected. The Commission noted that the term "everyone" is not defined in the Convention, but that in no instance in which the word "everyone" is used is there possible prenatal application—although such an interpretation could not be excluded entirely.²²⁶ Similarly, the qualifications in article 2(2) which permit the taking of life in the case of lawful execution, self-defence, arrest, and so on, clearly have application only to living persons.²²⁷ The Commission concluded that the overall tenor of the Convention suggests that the word "everyone" does not include reference to

224. 19 Decisions & Reports at 253, para. 26.

225. *Id.* at 254, para. 27.

This must be right. It would be totally at odds with the dignity of a woman to argue that the man who has made her pregnant should have any additional right to determine her condition. That is not to deny the interests which society may have in the morality or social aspects of abortion; these are, of course, concerns which must be balanced against the individual freedom of the mother. But to seek to balance the liberty of the mother against the predilections of the father is not something which the law should seek to do.

226. *Id.* at 249, para. 7.

227. *Id.* at 250, para. 8.

the unborn.²²⁸

The Commission also briefly considered the meaning of the term "life" in article 2, but it cannot be said that its discussion added anything significant to the general debate.²²⁹ Clearly the foetus could not be recognised as having an absolute right to life if that meant that its right to life should continue in the face of serious risk of death or injury to the pregnant woman. Whether the foetus should be regarded as having a qualified right to life was something on which the Commission avoided expressing a final opinion.

IV. THE INDUSTRIAL AND POLITICAL SIGNIFICANCE OF THE CONVENTION

The European Convention on Human Rights is largely concerned with the traditional political and civil liberties, although as we have seen this has provided the opportunity for the Court to pronounce a series of decisions which have a substantial social and cultural impact. The Convention does not seek to protect economic and social rights, but this does not prevent it having substantial social significance. Traditionally it is an instrument warmly supported by liberals and radicals, but it can serve as a stumbling block to those who seek to press for too great a measure of social reform. The most significant decision in this respect to date was taken by the Court in the "Closed-shop case." In spite of the fact that the decision itself was inconclusive and evasive, it has had an impact on United Kingdom industrial practices.

In *Young, James & Webster v. United Kingdom* (the "Closed-shop case")²³⁰ the applicants were employees of British Rail before the conclusion of a closed-shop agreement²³¹ between British Rail and its three railway unions in 1975. Each refused to join one of the appropriate unions.²³² The case revolved around the interpretation of article 11 which provides:

228. *Id.*, para. 9.

229. The Commission's opinion rejected any interpretation of article 2 that would recognize an absolute right to life in the foetus, but refrained from taking a position on whether that article does not cover the foetus at all or whether it has application "with certain implied limitations." *Id.* at 252-53, paras. 17-23.

230. 1981 Y.B. EUR. CONV. ON HUMAN RIGHTS 440 (Eur. Ct. of Human Rights), ser. A, no. 44, 4 E.H.R.R. 38.

231. The closed-shop can take on different forms, but in essence it is a system which requires an employee to join an appropriate trade union.

232. Two of the employees refused to join on grounds which could loosely be described as conscience and political persuasion, while the other appears to have refused to join because the union was not looking after his interests to his satisfaction. 4 E.H.R.R. at 47, para. 34, 48-49, para. 37, 49-50, paras. 43-44.

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

The question for the Court was whether the right to freedom of association with others implies the right to choose freely not to associate with others. The evidence of the *travaux préparatoires* suggests that the Convention was not intended to strike at the closed-shop, but the majority of the members of the Court took the view that if there was no control over the methods of compulsion which could be imposed on workers to join a trade union then this would strike at the very substance of the freedom which article 11 was designed to guarantee. The Court drew back from expressing a view on the legality of the closed-shop system itself, but had specific regard of the circumstances in which the three employees were dismissed from their livelihood for failing to join the union.²³³ It is by no means certain that the same principle would have been applied by the Court if the closed-shop had already been in existence when the employees had joined British Rail.

The "Closed-shop case" leaves more questions unanswered than it answers, but it is included here to demonstrate that the jurisprudence which is developing under the European Convention on Human Rights is not confined to developing and enlarging new social and cultural norms and to the traditional areas of liberty and due process of law. It can have wider economic and industrial significance. Under a Tory Government the United Kingdom trade unions have lost much of their power and privilege, and the potential clash between the policies of a government elected on a platform of increasing the power of organised labour and the United Kingdom's international treaty obligations has been avoided for the time being.

V. CONCLUSION

We have attempted to present and analyze the evolving jurisprudence under the European Convention on Human Rights and Fundamental Freedoms by focusing on certain dynamic tensions, tensions that have shaped that jurisprudence to date and undoubtedly will influence its future development. The inherent conflict between a need for uniform enforcement of the Convention, on the one hand, and the special problems and situations of signatory states on the other has been eased in part by the application of the doctrine of the margin of appreciation. This is a fluid concept which can accommodate some of the inevitable ebb and flow of changing norms and changing circumstances as well as

233. 4 E.H.R.R. at 53-54, paras. 53-54.

the differences in domestic practices and mores. Like the application of the doctrine of the margin of appreciation, the substance of various rights and corresponding obligations embodied in the Convention and its protocols also has evolved—at first slowly but then much more rapidly since the first decision of the European Court of Human Rights nearly a quarter of a century ago.

We also have looked at some of the ramifications of being a signatory state, focusing particularly on the United Kingdom. The slow etching out of rights from an instrument phrased in the broad language of principle is a process unfamiliar to the British, and in the case of the Convention some of the results of that process have been disconcerting to them. It has been a salutary experience for the United Kingdom, which has long prided itself on its tradition of established political and civil rights, to be found wanting at the bar of European opinion. Britain's Magna Carta traditionally has been viewed as something of a beacon of civil rights in the Middle Ages, and her philosophers and constitutional protections greatly influenced the American Declaration of Independence and the later Bill of Rights in the United States Constitution. It is ironic that United Kingdom citizens should have had to wait so long and finally settle for an international instrument to provide them with the fundamental protections they taught others to cherish.